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VOL II

CASES ON CRIMINAL PROCEDURE

SELECTED FROM THE DECISIONS OF THE SUPREME COURT OF IOWA

BY

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VOL. II

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Form and Contents.

(a) The Caption and the Commencement.

The prominent features of an indictment are the (1) caption, (2) commencement, (3) charge, (4) conclusion, (5) signatures, and (6) indorsements. The consideration of the caption and the commencement under the same heading would undoubtedly have shocked the early common law pleaders, and yet seems to be quite proper in the study of Iowa Criminal procedure. The reason for this is not hard to find. The early common law caption was an explanatory statement added when the indictment was removed from an inferior to a superior court. Its purpose was to show to the appellate court the authority by which it was found. The commencement, on the other hand, was a part of the original bill found by the grand jurors to be a true bill, and was as its name indicates, the commencement of the accusation itself. It is for this reason that the caption of the old indictments is commonly found to be in the past tense, while the commencement is always in the present. Under our practice the caption and the commencement both appear in the bill of indictment.

To make clear why most of the problems of the early common law of caption and commencement are now obsolete, no more is necessary than to give an early form followed by the modern statutory form. In each case the commencement is given in brackets to distinguish it from the caption.

Common Law Form of Caption and Commencement.

Middlesex. At a general sessions of the peace, holden at S., in the county aforesaid, on the second day of April in the sixth year of the reign of our sovereign lord George the Fourth, by the grace of God of the united kingdom of Great Britain and Ireland, King, defender of the Faith, before A. B., C. D., and their fellows, justices of our said lord the King, assigned to keep the peace of our said lord the King, and also to hear and determine divers felonies, trespasses and other misdemeanors in the same county committed, by the oath of E. F., G. H., I. J. K. L., M. N., O. P., Q. R., S. T., U. V., W. Y., Z. A., and B. C. good and lawful men of the said county, sworn and charged to inquire for our said lord the King, and the body of the said county, it is presented in the manner following that is to say: Middlesex, to-wit. The jurors of our said lord the King upon their oath present, that Elizabeth Powell, late of the parish of Saint Paul, Covent Garden, in the county of Middlesex, widow, on the twentieth day of February in the sixth year of the reign of our sovereign lord George the Fourth, by the grace of God of the united kingdom of Great Britain and Ireland, King, defender of the Faith, with force and arms, at the said parish of Saint Paul, Covent Garden, in the said county of Middlesex did (the statement of the offense would follow here). (This form is adapted from a caption quoted from Lord Hale in 1 Chitty's Criminal Law 326 and a commencement suggested by Chitty

on page 1 of the second volume of the same work. For the most part the wording is carefully followed except where changes are necessary to coordinate the two, but there are so many such changes that quotation marks are omitted.)

Form and Contents

Statutory Form of Caption and Commencement.

District Court of the County of Johnson.

State of Iowa
vs.
A.... B ....

[The grand jury of the county of Johnson, in the name of the state of Iowa, accuses A .... B .... of the crime of manslaughter, committed as follows:] (5281). The caption under our procedure is merely the title of the action and is so named by the Code (5280-1).

Wrockledge v. State.

Supreme Court of Iowa, 1855. 1 Iowa 167.

The defendant's demurrer to the indictment having been overruled, he entered a plea of not guilty. He was convicted and appealed.

Isbell, J. .....

The first question that is raised by the demurrer, is, whether this prosecution is conducted in the name and by the authority of the state of Iowa, within the meaning of the constitution. The style of the indictment is as follows: "The state of Iowa, Muscatine county. In the District Court for said county. May term, A. D. 1854. The grand jurors of the state of Iowa, within and for the body of the county of Muscatine, duly elected, impanneled, charged and sworn, to inquire within and for the body of said county, in behalf of said state of Iowa, on their said oaths, present," &c. The constitution, article 5, section 6, provides that "the style of all process shall be, 'The state of Iowa,' and all prosecutions shall be conducted in the name and by the authority of the same." It is contended that instead of "in behalf of said state," that a presentment should be expressed in the indictment to be "in the name and by the authority of the state of Iowa." While we think the latter the more appropriate style, we are not

prepared to say that it is the only phrase that my be used, or that it is essential to the validity of the indictment. The phrase placed under quotation in this section of the constitution, to wit, "The state of Iowa," constitutes the technical, authoritative name of the state. See Harriman v. The State, 2 G. Greene, 270. It is in this name that all prosecutions must be conducted and it is by the authority of the same, that they must be conducted. But we do not understand the constitution, by this, to mean that it must be expressed in each proceeding, in the conduct of a prosecution, that it is made in the name and by the authority of the state of Iowa. We are aware of no judicial construction having been placed on this clause. There is at least no reported case, that throws any light upon it. Certainly, the legislature has not regarded the construction claimed by plaintiff in error, as the true one. It has provided a form for a warrant of arrest, Code, section 2827; of commitment, section 2875; of information before a justice of the peace, section 3326; in all of which, if we assume the construction contended for, the expression should appear. Yet in none of these forms is it to be found. This legislative construction, it is true, is not controlling upon this court; and did we concur in the construction contended for, we should not hesitate so to pronounce; but understanding the constitution as we do, we see no cause for invalidating these forms, or reversing the judgment in the case, on account of any provision in that section.

.....

Affirmed.

State v. Smith.

Supreme Court of Iowa, 1910. 148 Iowa 640, 127 N. W. 988.

The defendant appealed from a conviction of the crime of maliciously injuring and defacing a building.

Sherwin, J. - .....

The indictment was in the following form: "The grand jury of the county of Cherokee, in the name and by the authority of the state of Iowa, accuses malicious injury to the building and fixtures of the crime of committed as follows: The said C. M. Smith, on or about the 26th day of April, in the year of our Lord one thousand nine hundred and eight, in the county as aforesaid, did willfully and maliciously injure a building, to wit, the building belonging to the New State Telephone Company, located on a part of the south half of lot number eight in block number fourteen, Lebourveau's addition to New Cherokee, Iowa, by the willful and maliciously breaking by the said defendant of the plate

glass window in the frame door of said building on said date, contrary to the Iowa statutes, all done in Cherokee, Cherokee County, Iowa, said building owner being a corporation duty organized under the laws of Iowa."

The appellant contends in various forms that the indictment in this case is fatally defective, for the reason that it was not drawn in strict compliance with the provisions of section 5281 of the Code. The principal objection that he makes to the indictment is based upon the fact that the caption of the indictment does not specifically accuse him of any crime. It is said that the indictment is insufficient, because in the caption it is said that the state of Iowa accuses malicious injury of committing a crime, instead of accusing the defendant. There is no merit in this contention, for several reasons. In the first place, the language used in the caption, and even the caption itself, might have been wholly omitted without in any way affecting the validity of the indictment. State v. McIntire, 59 Iowa, 264; State v. Davis, 41 Iowa, 311. The body of the indictment clearly charges that the crime of malicious mischief was committed by the defendant, C. M. Smith, and every necessary element of a valid indictment is contained in the charging part of this indictment.

.....

Affirmed.

(b) The Accusation.

(1) In General.

The accusation must be "a statement of the facts constituting the offense in ordinary and concise language, without repetition, and in such manner as to enable a person of common understanding to know what is intended" (5280). This, of course, means the English language, which includes such words or expressions as have become Anglicized. Also "the Roman numerals and Arabic figures are to be taken as a part of the English language" (State v. McPherson (1901), 114 Ia. 492, 495, 87 N. W. 421); but "as words are usually more reliable and certain than mere figures, it is no doubt a more reliable practice to represent amounts and dates by writing them out in full; especially when time or the amount constitutes an essential ingredient of the offense" (State v. Seamons (1848), 1 G. Greene 418, 420). In the same way "the use of well understood abbreviations in an indictment does not render it defective" (State v. McPherson, supra) but they are avoided by the careful pleader. The reason in both instances is not that these things find favor with the court but because "no indictment is insufficient .... for any .... matter which was formerly deemed a defect or imperfection, but which does not tend to prejudice the

substantial rights of the defendant upon the merits" (5290). Thus an indictment is not fatally defective because it is ungrammatical (State v. Kruppa (1916), 176 Iowa 403, 158 N. W. 401), or improperly punctuated (State v. Pennell (1881), 56 Iowa 29, 8 N. W. 68, 41 Am. Rep. 81) or incorrectly paragraphed (State v. Powers (1917), 181 Iowa 452 - N. W. -), if a person of common understanding would know what was intended. It may be added that a bill of indictment drawn with great care will contain no erasures, although in the absence of any indication to the contrary it has been assumed that an erasure was made before the indictment was found and presented (State v. Hatlestad (1906), 132 Iowa, 188, 109 N. W. 613).

The early cases contain many nice problems involving repugnancy and surplusage. The indictment was defective if it contained any repugnant or inconsistent averments unless the inconcistency could be corrected by striking out part as surplusage. It is still true that an indictment cannot stand if there are inconsistent statements of such a nature that it is not clear what the charge is really intended to be. But the overdrawn niceties of the common law on this point have disappeared under the Code provision that "no indictment is insufficient .... for any surplusage or repugnant allegation, or for any repetition, when there is sufficient matter alleged to indicate clearly the offense and the person charged" (5290). This clause seems to imply that an indictment was sometimes defective at common law because of surplusage. This is incorrect. The importance of surplusage was that various defects could be cured by striking out that which was regarded as surplusage. Aside from repugnancy, this arises most frequently in instances of duplicity and of a variance between the indictment and the proof.

State v. Boomer.

Supreme Court of Iowa, 1897. 103 Iowa. 106, 72 N. W. 424.

The defendant appealed from a judgment of conviction of the crime of fraudulent banking.

Robinson, J. - .....

I. At the close of the evidence, the defendant asked the court to direct a verdict of not guilty on several grounds, one of which was that there was a material variance between the indictment and the proofs. The alleged variance was as follows: The indictment charges that the deposit in question was "in lawful money of the United States, a particular description of which is to the grand jurors unknown", while the proof failed to show that it was in coin of the United States or notes or certificates which it was required to redeem. The testimony of the employe

who received the deposit was that it was two hundred dollars; that it was currency, but that he did not notice "whether it was national currency or greenbacks or silver certificates"; that there "might have been a gold certificate" It is not claimed that, to constitute the offense of fraudulent banking by receiving a deposit when the bank or person receiving it is insolvent, it is essential that the deposit consist of money issued by the United States. The language of the statute cited leaves no room for such a claim, but includes "all currency or other notes, bills or drafts circulating as money or currency." The claim is that the proof must conform strictly to the charge, even though that he made with unnecessary particularity. There are undoubtedly many decisions which tend to sustain that claim. 1 Greenleaf, Evidence, section 65. In State v. Newland, 7 Iowa, 242, the indictment charged that the defendant passed counterfeit bills which purported to have been issued by a "corporation duly authorized for that purpose, by the state of Massachusetts"; and it was held incumbent on the state to prove that averment. So, in State v. Crogan, 8 Iowa, 523, where the indictment charged that the defendant kept a place resorted to for the purpose of gambling, in a building on a lot specified, it was held that, although it was unnecessary to have described the location of the place further than to show the proper venue, yet, as it was more specifically described, the proof must show that the plac was on the lot specified. Those cases did not arise under the statutes which govern this case. Section 4305 of the Code of 1873 provides that an indictment "is sufficient if it can be understood therefrom: ..... (5) That the act or omission charged as the offense, is stated with such a degree of certainty, in ordinary and concise language, and in such a manner as to enable a person of common understanding to know what is intended, and the court to pronounce judgment upon a conviction according to the law of the case." Section 4306 provides that "no indictment is insufficient, nor can the trial, judgment, or other proceedings thereon be affected by reason of any of the following matters: .... (4) For any surplusage or repugnant allegation, or for any repetition, when there is sufficient matter alleged to indicate clearly the offense and the person charged; nor (5) for any other matter which was formerly deemed a defect or imperfection, but which does not tend to the prejudice of the substantial rights of the defendant upon the merits." The case of State v. Hesner, 55 Iowa, 494, arose under those statutes, and is especially relied upon by the appella In that case the indictment charged the defendant with the crime of selling intoxicating liquor known as "whisky," in violation of law; and it was held that an instruction which authorized a conviction on proof of the sale of intoxicating liquors other than whisky was erroneous. But the charge that the defendant was guil of selling whisky illegally was so specific and definite as to be well calculated to exclude, by implication, illegal sales of othe liquors, and thus mislead the defendant, to his injury, in the pr paration of his defense. That case is so unlike this in importan particulars as not to be in point. The deposits which the statut which creates the offense of fraudulent banking is designed to prevent are of any kind of money, bank bills, or notes, treasury

notes issued by the United States, currency, or other notes, and bills or drafts circulating as money or currency; and it is wholly immaterial whether the deposit be of money issued by the general government or not. The statute does not specify "lawful money of the United States." In a general sense, such money is any lawful money which is circulated in the United States. In a comprehensive sense, money is "any currency usually and lawfully employed in buying and selling." Webster Inter. Dictionary. It includes "whatever is lawfully and actually current in buying and selling, of the value and as the equivalent of coin." 15 Am. & Eng. Enc. Law, 701. See also, Klauber v. Biggerstaff, 47 Wis. 557 (3 N. W. Rep. 357). In view of the purposes of the statute, and the popular understaning of the term "lawful money," and the absence of any more definite designation that "lawful money of the United States," we conclude that the indictment was designed to include any money which was lawfully circulated in the United States; and hence that the words "of the United States" may be rejected as surplusage. Had the indictment charged that the deposit was of money particularly described, as of gold coin, or of treasury notes of a particular denomination and number, it may be that no part of the description could have been rejected as surplusage, and that the case would have been within the rule of State v. Hesner, supra. For the reasons shown, we are of the opinion that there was no variance in proof which was prejudicial to the defendant. See State v. Ean, 90 Iowa, 536; Tracy v. State, 46 Neb. 361 (64 N. W. Rep. 1071).

.....

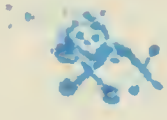
Affirmed.

State v. Schuler.

Supreme Court of Iowa, 1899. 109 Iowa 111, 80 N. W. 213.

This opinion disposes of two cases in which the same problem are involved. In both the defendants pleaded guilty and then moved in arrest of judgment. They appealed from judgments entered against them after these motions were overruled.

Deemer, J. - The indictments each contain two counts, one charging the defendant with keeping a building and erection or place in Howard county in which he sold, or kept with intent to sell, intoxicating liquors contrary to law, and the other with keeping a building or place in the village of Protivin, in Howard county, in which he sold, or kept with intent to sell, intoxicati liquors contrary to law. There is no statement of an intent to charge but a single offense. The demurrer was on the ground that



the indictment charged two separate offenses, and that it was indefinite and uncertain as to the offense charged and the particular circumstances thereof. The plea was guilty of the offense charged. The motion in arrest of judgment, among other things, charges that on the whole record no legal judgment can be rendered, because of the condition of the indictment. The first count of the indictment charged a complete offense (State v. Dean, 44 Iowa, 648; State v. Waltz, 74 Iowa, 610, and cases cited); that is to say, it was not necessary to more particularly describe the locus. The second charges the keeping of a nuisance in a particular building that is situated in the town of Protivin, in Howard county. Having thus described the building, it was incumbent on the state to prove the keeping of that particular nuisance. State v. Crogan, 8 Iowa, 523; State v. Hesner, 55 Iowa, 494; State v. Newland, 7 Iowa, 242. Indeed, a particular description of the building is necessary when abatement of the nuisance is sought. State v. Waltz, 74 Iowa, 610. (Such an allegation is not surplusage, and must be proven as alleged. See authorities heretofore cited. Defendants might have been convicted on the first count of the indictment upon proof of keeping a nuisance in any place within the limits of Howard county. It seems quite clear that it was not intended to charge but a single offense. The indictment does not so state, and there was no necessity for the second count, unless it was for the purpose of creating a foundation for the abatement of the nuisance. If that was the purpose, then there was no necessity for the first count, unless the state expected to prove the existence of another nuisance. The case does not differ essentially from State v. Chapman, 94 Iowa, 67, wherein it is held that an indictment charging the keeping of a nuisance in "a building, erection, place, and railroad car" was bad for duplicity. In any event, the indictment is not direct and certain, as required by section 5282 of the Code. The demurrers should have been sustain

As the indictment charged two offenses, and the plea is, "Guilty of the offense charged," the judgment has not that certainty which the law requires for the protection of the defendant against future prosecutions. No one can tell from this record whether defendants were convicted of the crime of keeping a nuisance at the village of Protivin, or at some other place in Howard county. Com. v. Haskins, 128 Mass. 60; State v. Karlowski, 142 Mo. Sup. 463 (44 S. W. Rep. 244). That a judgment in a crimi case should be so direct and certain as that it may constitute a bar to a further prosecution for the same offense is so elementary that a citation of authorities is not needed to enforce the propo sition. For the errors pointed out, the judgments are each Reversed.

(2) Certainty of Statement.

In the statement of the offense charged, certainty is required. This is necessary: first, to so identify the offense that the defendant will be able properly to prepare his defense to that action and to plead the acquittal or conviction therein in bar of a later prosectuion for the same offense; second, to enable the court to limit the proof to the offense charged, and to know what punishment to impose if the defendant is convicted. Such certainty cannot be obtained unless the facts stated constitute an offense. If any essential statement of fact is omitted, the facts stated do not constitute an offense and the indictment is fatally defective. Conclusions of law are not statements of fact and will not take the place thereof; and, on the other hand, an error or omission in the statement of a conclusion of law, the facts supporting which have been correctly stated, is not an important defect.

It is not necessary that the change should contain averments of matters of evidence nor matters of which the court will take judicial notice. But since certainty is required it is necessary that every essential fact should be alleged directly and positively. The charge cannot be supplemented by argument or intendment; nor can the offense be stated in the disjunctive.

State v. McCormick.

Supreme Court of Iowa, 1869. 27 Iowa. 402.

Having been convicted of murder in the first degree, and sentenced to be executed, the defendant appealed on the ground that the indictment was insufficient to charge murder in the first degree. The first count of the indictment was as follows:

"State of Iowa, Humboldt count, ss:

The State of Iowa }
agst. }
Martin McCormick. }

To the District Court for said State, within and for said county, at the May term thereof, in the year of our Lord one thousand eight hundred and sixty-eight.

The jurors of the grand jury of the State of Iowa, within and for said county of Humboldt, legally convoked, impaneled, tried, sworn, and charged in the name and by the authority of

the State of Iowa, upon their oaths, do aver, find and present, that Martin McCormick, at and within said county, on the 18th day of December, A. D. 1867, committed the crime of murder, in the first degree, in and upon one William James, then and there being, feloniously, willfully, deliberately, and premeditatedly, and of his malice aforethought, did make an assault, and that the said Martin McCormick, with a certain piece of a board or slat of a bedstead, the said Martin McCormick in and upon the head of him, the said William James, then and there feloniously, willfully, deliberately and premeditately, and of his malice aforethought, did strike and bruise, giving to him, the said William James, then and there, with the piece of a board or slat aforesaid, in and upon the top and back of the head of him, the said William James, two mortal wounds, of which mortal wounds the said William James then and there instantly died. And so the jurors aforesaid, upon their oaths, do say, that the said Martin McCormick then and there, in the manner and form aforesaid, feloniously, willfully, deliberately and premeditately, and of his malice aforethought, did kill and murder.

The second count was admitted to be defective.

Dillon, Ch. J. .....

We turn now to the first count. It will be perceived that it contains no allegation that the murder was committed in the perpetration or attempt to perpetrate any of the felonies enumerated in section 4192 of the Revision, copied in the statement; and an instruction which the court gave to the jury at the instance of the State shows that the claim to convict for murder in the first degree was not based upon the evidence tending to establish the commission of a felony, but upon evidence tending to show that the killing was willful, deliberate and premeditated.

It is with this kind of killing only that we have to do in the present case. To make this kind of homicide murder in the first degree, the statute (§ 4192) declares that the killing must be willful, deliberate and premeditated. There is no claim or averment that the murder was committed by poison or lying in wait, and for the reasons before given the case is not to be considered as one having reference to the felonies mentioned in section 4192. The killing then, to make murder in the first degree (and the kind of killing which was relied on below) is one which is willful, deliberate and premeditated.

The specific objection made to the first count of the indictment is that it does not charge that the killing was willful, deliberate and premeditated. This objection is well founded. The indictment does indeed charge that the assault was willful, deliberate and premeditated; that the blow was dealt purposely, deliberately, with premeditation, but it does not charge that it was thus dealt for the purpose or with the intent to kill, or that the killing, the taking of the life of the deceased, was willful, deliberate

and premeditated. It needs no argument to show that an assault may be willful, deliberate and premeditated, without there being any intent whatever on the part of the assailant to kill or take the life of the person assaulted.

And it is just here that the indictment, considered as one charging murder in the first degree, is defective. This appears from the statute, which is, that "the killing," and not simply the assault, must be willful, deliberate and premeditated, in order to constitute murder in the first degree. And the point has been so adjudged under statutes, which, like ours, divide murder into degrees.

The following authorities are precisely in point: Fouts v. The State, 8 Ohio St. 98; Kain v. The State, id. 306; Hagan v. The State, 10 id. 459. Fouts v. State, 4 G. Greene, 500; Bower v. The State, 5 Mo. 364; State v. Jones, 20 id. 58. And see 1 Whart. Cr. Law, § 1084; State v. Feaster, 25 Mo. 325.

We are aware that the cases are not uniform respecting the question whether, to constitute a good indictment for murder in the first degree, it is necessary to allege that the killing was willful, deliberate and premeditated. See the cases on this subject cited in 1 Whart. Cr. Law (5th ed.) § 1115; and the subject extensively and most ably discussed by Mr. Bishop, 2 Crim. Proced, § 562 to 597 inclusive.

This point was presented to the Supreme Court of the State in the case of Fouts v. The State (4 G. Greene 500), and the court there decided that a "common-law indictment for murder is not necessarily good under our statute for murder in the first degree. Greene, J. remarks (id. p. 504,) that, "In order to present a case of murder in the first degree, it is obvious the indictment should have charged, in addition to the malice aforethought, that the crime was committed willfully, deliberately, and premeditately."

It is in point against the sufficiency of the first count as one charging murder in the first degree. The State v. Johnson (8 Iowa, 525) does not overrule it in this respect. Having been made, the question this court has to meet is: Are these reasons of such weight as to justify us in overturning it? As a matter of legal principle the reasoning in support of the proposition that an indictment for murder which is sufficient at common law, is not necessarily sufficient for the statute offense of murder in the first degree is unanswerable, at least in a State where, as in Iowa, there are no common-law crimes, and where the Criminal Code is entirely statutory.

There is no principle in the law of criminal pleading more reasonable in itself, and none better understood than the one

that the indictment must fully charge the crime; that it must set out all that the law requires to be proved before the penalty of the law can be inflicted, and consequently every thing which changes the nature or increases the degree of the punishment is substantive, and ought to be alleged.

Now, aside from the instances where the killing takes place in the perpetration or attempt to perpetrate some of the specified felonies, there is one indispensable element which must be present to make the killing murder in the first degree, and that is, a specific intent to take life. This criminal intent, premeditated and existing in the mind, is what confers upon the killing its peculiar atrocity, and it is this kind of killing against which the statute denounces the death penalty.

If this ingredient is wanting, the offense shrinks to a smaller compass, and is visited with a different and milder punishment.

On principle, why should not the facts which make the offense of the higher grade or degree be required to be set out?

On principle, how can want of averment be supplied by an independent inquiry by the jury and a finding by them of a fact not alleged on the record against the prisoner, viz., that he intended to take the life of the deceased, a fact necessarily included in every finding in cases like the present that he is guilty of murder in the first degree?

Every fact alleged in the body or charging part of the present indictment may be true, and yet the defendant not be guilty of murder in the first degree. That is, the assault may have been wilful, deliberate and premeditated, and so with the battery, and death may have ensued therefrom (and this is all that is alleged in the indictment), and yet, unless the defendant made the assault with the specific intent to kill, a fact not alleged, it is not murder in the first degree.

This being so, how, on a verdict of guilty, can a court be authorized upon the record to pronounce the sentence of death?

It cannot, except upon the anomaly that the verdict may find facts not alleged in the indictment, and that by supplementing the charge with the facts found by the jury, putting the two together, the court is advised that the crime is murder in the first degree.

The anomalous nature of this doctrine may be illustrated by commencing with the lower and proceeding up to the higher assaults.

In an indictment for a common assault, this is alone alleged, and though more be proved, the punishment can only be inflicted

for the offense charged. If the assault is an aggravated one with a criminal intent, as for example, to kill, to maim, etc. this aggravation, this intent, must be alleged, and the punishment is limited to the charge on the record and cannot be enlarged by any finding of the jury.

If the assault is with "malice aforethought", this must be alleged, and if death ensues it is murder, but if no more be stated or proved it is only murder in the second degree. But a killing may be with malice aforethought, and yet not be murder in the first degree.

To make the killing murder in the first degree, there must be added to the malice aforethought, the element of an intent to kill, and if so, why should this not be alleged? or words used or facts stated from which the law infers this intent?

After an extensive examination of this subject, Mr. Bishop thus concludes: "The result is, that, according both to principles of common law, and to those principles of natural reason and justice which are inherent in the case, the indictment for murder, where the statute divides it into two degrees, should, if murder of the first degree is meant to be proved against the prisoner, contain those allegations which show the offense to be in this degree." 2 Crim. Proced. § 584.

If a common law form of indictment shows this, as is sometimes the case, it is sufficient under our statute for murder in the first degree; otherwise, it is good only for murder in the second degree.

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At the defendant's request the judgment was changed to second degree murder.

State v. Behm.

Supreme Court of Iowa, 1887. 72 Iowa 533, 34 N. W. 319.

From a judgment of conviction of the crime of manslaughter the defendant appealed.

Adams, Ch. J. - The defendant moved in arrest of judgment, on the ground that the indictment fails to charge an indictable offense. The court overruled the motion, and the overruling is assigned as error. The indictment charges that "the defendant did willfully and feloniously make an assault in and upon a certain male child which had then and there been born alive to the said Maggie Behm, with the specific intent by the Maggie Behm then and there unlawfully and feloniously the said child to kill and murder; and the said Maggie Behm did then and there unlawfully and feloniously,

and with the specific intent to kill and murder said child, with both her hands put and place said child in a certain outhouse, and then and there did unlawfully and feloniously desert and leave said child exposed to the inclemency of the weather, without sufficient clothing, covering, shelter, and protection for the body of said child, of and from which exposure, so unlawfully and feloniously made by said Maggie Behm, with intent as aforesaid, said child then and there did die."

1 One of the defendant's objections to the indictment is that it does not allege that the defendant was in duty bound to provide for and protect the child. To this we have to say that the position might be well taken if the charge was simply that the defendant willfully and feloniously caused the death of the child by neglecting it. But the indictment charges much more than that. It charges the defendant with being guilty of wrongful acts which created the exposure in part, and charges that it was of such exposure that the child died.

2 Another objection made to the indictment, is that it does not charge that the child was unable to help itself. But it charges, in substance, that it died from the exposure created by the defendant. If the child could have helped itself, and had voluntarily remained where it had been placed by the defendant, then it would itself have caused its exposure by its own volition, and in no proper sense could it have been said that it died of the exposure caused by the defendant, as the indictment charges. We think that the district court did not err in overruling the motion in arrest of judgment.

Affirmed.

(3) Name and Description of the Defendant.

An indictment is defined by the Code as an "accusation in writing..... charging that a person therein named has done some act" etc. (5279); and it must contain "the names of the parties" (5280). A description of the defendant by the name by which he is commonly and generally known is sufficient although it may be a nickname; and if there is any doubt as to which of two names is the one by which the defendant is commonly designated, they may be laid under an alius dictus. The English Statute of Additions (1 Henry V c5, 1413) required that in addition to the defendant's name there should be given "his estate, degree, or mystery", but this has no part in Iowa Criminal Procedure.

Donnel v. The United States.

Supreme Court of Iowa, 1843. Morris 141.

Per Curiam, Mason, Chief Justice. - Two indictments were

found against the plaintiff in error under the gaming act, in which his name was written Donald.

To each of these he pleaded in abatement, alleging that his name was Donnel. Demurrers were filed to these pleas, and those demurrers sustained on the ground that the two names were idem sonans. This is the principal error complained of.

Courts are not fastidious in enforcing absolute precision in regard to orthography. Names admitting of the same pronunciation are often made up of very different letters. In these cases, a mistake of one mode of spelling for another is unimportant, even in an indictment. The public prosecutor is not bound to ascertain the particular letters used by the accused in writing his name, for this might often be impracticable. But where the orthography of the indictment composes a name which, by the ordinary rules of pronunciation, produces a different sound from the true one, the mistake will be fatal. In the present case, perhaps, the ear would not readily catch the difference in pronunciation, still, the names are very different. Even if it be a fact that the two names are ordinarily pronounced so nearly alike as not to be distinguishable, that is a fact which we cannot judicially know. We think, therefore, the court erred in deciding that the two names were of the same sound.

The judgment below will, therefore, be reversed.

State v. Bowman.

Supreme Court of Iowa, 1889. 78 Iowa 519, 43 N. W. 302.

The defendants appealed from a judgment of conviction of the crime of keeping and maintaining a liquor nuisance.

Rothrock, J. - I. The indictment named one of the defendants as George M. Bowman. It appears from the evidence that there are two Bowmans named George. One is an old man, and his name with the middle initial is George M. Bowman. The other is a young man, named George J. Bowman. It is evident from the testimony of the witnesses in the case that the young man was the one who sold part of the liquor, and was engaged in keeping the alleged nuisance. The record shows that the defendant John A. Bowman was arraigned and pleaded not guilty; but it is silent as to an arraignment of George M. Bowman, or as to the plea put in by him. It is claimed he has never had his day in court for that reason. There is no showing that the real party charged was not present at the trial and fully identified, and the proceeding must be regarded as a trial as to him. The cause appears to have been tried, in all respects, as if a plea of not guilty had been put in. The failure to

have the record show affirmatively that the arraignment was made or waived, and plea put in, is a mere irregularity, not prejudicial to the defendant. State v. Greene, 66 Iowa, 11.

Complaint is made of an instruction given by the court to the jury, which was as follows: "Some question has arisen on the trial as to the identity of the George Bowman referred to by the witnesses. It is immaterial whether the indictment describes the defendant by the proper middle initial letter or not. The question for the jury to determine is whether the person who is being tried did or did not commit, or assist, aid or abet in the commission of the offense charged. If you find from the evidence that he did so commit, or assist, aid or abet in the commission of, the offense, you should find him guilty, without reference to any variation in the name by which he is known or described. If, however, you have any reasonable doubt as to the act, or as to the person, then you should acquit."

It is claimed that the instruction should have directed the jury that it was George M. Bowman who was being tried, instead of some person identified, though his name might vary from that in the indictment. It appears to us, in view of the apparent confusion in names, that the instruction was proper. The variance was immaterial, and the court rightly directed the jury to consider the evidence as applicable to the person who was on trial, or being tried. It was identity of person rather than technical nicety as to names which the jury were rightfully directed to consider.

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Affirmed.

Geiger v. State.

Supreme Court of Iowa, 1857. 5 Iowa 484.

"At the October term of the District Court for Des Moines county, 1857, an indictment was found by the grand jury against a person described as a man in Turner Hall, whose name to the grand jurors is unknown. By virtue of a warrant issued on this indictment, the sheriff arrested John Geiger, [the appellant in this cause,] and returned the warrant as follows: Executed this writ, by bringing before the court a man supposed to be the person meant. A motion for the discharge of Geiger from custody, was overruled. He then moved the court to quash the indictment, which motion was overruled, and being arraigned upon the indictment, and required to plead, he gave his name as John F. Geiger, and pleaded not guilty. The cause being submitted to the court, the defendant was found guilty and sentenced to pay a fine of fifty dollars. From this judgment, he sued out his appeal."

Stockton, J.-- The questions made by defendant, upon the motion for his discharge, to quash the indictment, and upon the demurrer thereto, all resolve themselves into a single one, viz: whether the indictment is sufficient to authorize the arrest of defendant, and the holding him in custody. The definition of an indictment, as given by the Code (Sec. 2915), is, that it "is an averment in writing, made by the grand jury, legally convoked and sworn, that a person therein named and described has done some act, or been guilty of some omission, which by law is a public offense." By a subsequent section it is provided, that no indictment shall be quashed, if, among other requirements, it can be understood. That the defendant is named, or if his name cannot be discovered, that he be described by a fictitious name, with the statement that his real name is unknown. Code, section 2916.

The indictment, in this case, does not meet the requirements of the statute. The defendant is neither named or described. It was not a sufficient description to refer to him as "a man in Turner Hall." It is only where the defendant's name cannot be discovered, that it is permitted to the State to describe him by a fictitious name, with the statement that his real name is unknown. In this instance, there can be no pretence that the defendant is described by a fictitious name. It is not alleged that his name cannot be discovered, and the description by which it is attempted to identify him, may apply with the same certainty and distinctness to fifty men in Turner Hall, if there are fifty men there. If it were certain there was only one, it would be equally insufficient. The District Court erred in overruling the motion to quash the indictment and discharge the defendant from custody, and the judgment is reversed.

Judgment Reversed.

(4) Time and Place.

The statutory provision that "the precise time at which the offense was committed need not be stated in the indictment, but it is sufficient if it allege that it was committed at any time prior to the time of the finding hereof, except where the time is a material ingredient of the offense" (5285), does away with an absurd rule of the common law. An indictment was fatally defective if it did not state the day, month and year in which the alleged offense was committed, even if the circumstances were such that had the time been so stated a conviction could be supported on proof of an entirely different state. For example, an indictment drawn in 1801 charging that the offense was committed during the year 1800 or during the Month of May in 1800, would have been fatally defective; but if it was charged that the offense was committed on the first day of May in 1800, it would be permissible to prove

at the trial that it was committed on any day of that year. In truth, the time proved would support a conviction unless it was a day after the indictment had been found or one that was within the bar of the statute of limitations. This, of course, is true only if the offense is one in which time is not a material element. If the act was an offense only if committed on Sunday, the indictment would have to give a date which was on Sunday and no conviction could be secured unless the proof showed the act to have been done on Sunday, although it would not need to be the same Sunday that was averred. The indictment for an offense of a continuous nature was laid with a continuando, the best form of which was to allege that the offense was committed on a day certain and on divers other days between two days certain. If the continuando was not made certain in this or some other way it was defective, but could be rejected and the indictment could be supported on the day certain named, if there was one. This requirement of the day certain does not exist under our Code, except where theday is a material element.

Since there was at common law no period of limitations for criminal prosecutions, the purpose of requiring an exact statement of time could have been only to identify the offense. As the proof was not confined to the time stated the desired purpose was wholly lost.

The common law rules as to statement of the place in which the alleged offense was committed are more consistent. As the trial jury were once summoned, not from the county at large, but from the particular neighborhood in which the alleged offense was committed, it was necessary to specify the neighborhood as well as the county. But as the practice in this country is to summon the trial jury from the entire county, the general rule is that the statement of place need only show that the offense is within the jurisdiction in which the prosecution is being conducted. To this rule there are two exceptions. A statute may make certain acts criminal only if committed at a certain place. Thus, prior to general prohibition it was often made an offense to sell intoxicating liquor within a given number of miles of a certain college or university (see 2673). Obviously such place is of the essence of a crime of that nature and must be alleged and proved. Then there are offenses which can be committed in any part of the state, but only in connection with some local object, such as a building or a cemetery. Indictments for such offenses must include a statement of place which will show not only the venue, but also the local description.

The necessary statements as to time and place were required by the common law to be repeated in connection with every issuable and triable fact, unless different times were stated. The words "then and there" were commonly used for such repetition. Under the Code "no indictment is insufficient .... for the want of an allegation of the time or place of any material fact, when the time and place have been once stated" (5290).

State v. Ruby.

Supreme Court of Iowa, 1883. 61 Iowa 86, 15 N. W. 848.

The defendant appealed from a judgment of conviction of the crime of burglary.

Beck, J. - The indictment is in two counts, the first charging that defendant with others "at the county of Keokuk, and state of Iowa, on the second day of February, A. D. 1881, and in the night-time of said day, to-wit: at about eleven o'clock, did willfully, ... break and enter the dwelling-house of one J. S. Jones, ... with felonious intent, ... to then and there ..... feloniously steal, etc."

The second count charges that defendant with others "on the second day of February, A. D. 1881 and at the county of Keokuk, and state of Iowa, and at about the hour of eleven o'clock in the night-time of said day, did willfully, ... break and enter the dwelling-house of J. S. Jones, ... with the felonious intent to ..... steal, etc."

Counsel for defendant insist that the first count charges a breaking and entering in the day-time, and the second charges the same act done in the night-time, and that the indictment, therefore, charges distinct offenses in the separate counts. This position is based upon the thought that the words, "and in the night-time of said day," is an independent allegation of time expressed by the averment that the act was done upon the second day of February. In our opinion the position is erroneous, and the words have just the effect which counsel insist they do not have. They limit the allegation of time to the night of the day mentioned. Each count plainly charges the act to have been committed in the night-time.

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For other reasons the judgment was Reversed.

State v. Moore.

Supreme Court of Iowa, 1889. 78 Iowa 494, 43 N. W. 273.

Having been convicted of the crime of seducing an unmarried female of previously chaste character, the defendant appealed.

Rothrock, J. - I. It was alleged in the indictment that the crime was committed on or about February 1 in the year 1886, and the minutes of the evidence of the witnesses before the grand jury show that the defendant and the complaining witness first had

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sexual intercourse in March, 1884, and that the same continued, with an interval of about one year, until some time in the spring of 1886. In February of that year the complainant became pregnant, and was delivered of a bastard child, which was born October 30, 1886. In the introduction of the evidence the state sought to charge the defendant with the commission of the criminal act on or about the twenty-fifth day of July, 1885. The defendant objected to this on the ground that he was taken by surprise thereby. It has frequently been determined by this court that it is sufficient if the offense be shown to have been committed at any time within the period of the statute of limitations. State v. Bell, 49 Iowa, 440; State v. Kirkpatrick, 63 Iowa, 554; State v. Briggs, 68 Iowa, 416; State v. Wambold, 72 Iowa, 468.

The indictment was found and presented on the seventeenth day of November, 1888, and as that was more than eighteen months after the crime was committed, even as alleged in the indictment, it was averred therein that for two years after the commission of the offense the defendant was not usually and publicly resident within this state. By section 4166 of the Code an indictment for seduction must be found within eighteen months after the commission of the crime. But it is provided in Code, section 4169, that "no period during which the party charged was not usually and publicly resident within the state is a part of the limitation." So far as the claim of surprise is founded on the allegation of the indictment that defendant was not for two years usually and publicly resident within this state, we have to say that there is nothing in the record touching the proof of the defendant's residence, which, in the remotest degree, tends to show surprise. The defendant admitted, in his testimony, that he was absent from his home and neighborhood, and for part of such absence he was out of the state; and there is really no conflict in the evidence as to the duration of such absence. But, even if there were such conflict, the rule of the cases cited above, and other cases, is that the time named in the indictment is immaterial.

II. The evidence shows that the defendant visited the prosecuting witness in the capacity of a suitor. He accompanied her to dances, and visited her at the place of her residence, and, as the phrase goes, "kept company with her." Some time after he commenced visiting her he had sexual intercourse with her. This occured early in the year 1884. These acts of sexual intercourse were frequently repeated until about July 4, 1884, when, as the prosecuting witness testified, the parties quarreled, and there was no further intimacy between them for more than one year, and she claimed as a witness on the trial that during that time she had reformed, and became once more of chaste character, and that on the said twenty-fifth day of July, 1885, the defendant seduced her. We need not set out the evidence as to the absence of the defendant from the neighborhood and scene of his previous operations. The jury were fully warranted in finding that such absence was sufficient to arrest the operation of the statute of limitations for such a period as would sustain the

indictment, and the court properly charged the jury as to what constituted usual and public residence within the state.

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Affirmed.

State v. Gish.

Supreme Court of Iowa, 1914. 168 Iowa 70, 150 N. W. 37.

The defendant appealed from a judgment of conviction of the offense of operating his automobile upon the public highway without displaying the appropriate number plates thereon.

Evans, J. - The information charged the defendant with the violation of Secs. 7, 8, and 12, of Chapter 72 of the Acts of the 34th General Assembly, in that on May 29, 1913, he operated upon the public highway his motor vehicle, without having displayed thereon registration numbers, as required by the statute. That the defendant was operating his motor vehicle upon the public highway on the date named and that no number plates for 1913 were displayed thereon was and is conceded. His denial of guilt was predicated upon his inability to obtain from the secretary of state his official number plates, he himself having complied with every prerequisite of the statute to entitle him to such number plates. He offered evidence tending to prove that more than one month prior to May 29, he had properly re-registered his motor vehicle with the secretary of state and had paid the full fee required therefor; and also tending to show that the re-registration had in fact been entered by the secretary of state and a 1913 number assigned to the defendant, and that the re-registration receipt, including the number, had been received by the defendant; that the defendant failed to receive his number plates and that such failure was through no fault on his part. This line of evidence was all rejected on the ground that the sole question to be tried was whether the defendant operated his motor vehicle upon the public highway at the time alleged without displaying the required number plates. Upon this holding the defendant was necessarily convicted, regardless of the reason for the failure to display number plates and regardless of the question of his own default in relation thereto. We are first confronted, therefore, with the necessity of construing the statute upon which the prosecution is based.

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Assuming, as we must, that the defendant could have proved the facts which his offered evidence tended to prove and that he could have shown himself free from all default in the performance

of the precedent duties imposed upon him by the statute, it is repugnant to every sense of justice that he should be punished for his mere inability to obtain from the state the number plates due him. No statute ought to be construed to such a result if it will fairly bear a different construction. The purpose, of course, of statutory construction is to ascertain and declare legislative intent as expressed in the statute. It has often been held, however, that where a literal construction of a statute leads to absurdity or to manifest injustice or oppression, the court will not be bound by literal terms, but will seek a construction consistent with a sense of justice, if possible, and will presume such to have been the intent of the legislature.

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3. The dissenting opinion filed herewith renders it necessary that a few further facts be detailed. The emphasis of the dissent seems to be put upon the suggestion that the date of the offense as alleged in the information, viz., May 29, 1913, was not material and that the defendant might have been found guilty for violation of the statute as of April 26, 1913. The defendant himself testified: "I didn't start using my machine until the twenty-sixth day of April." Granting the foregoing to be sufficient to permit the affirmative inference that the defendant did use his vehicle on that date, there was no claim in the trial below that the state was entitled to a conviction for such offense, nor would the evidence in the record before us sustain a conviction as for an offense committed on any other date than May 29, 1913.

The defendant was arrested at Iowa Falls in Hardin County on the evening of May 29, 1913, under an information charging him with the violation of the statute on such date in Hardin County. He was convicted before a justice of the peace and appealed to the Hardin District Court. The defendant was not a resident of Hardin County. He was a resident of Blairsburg in Hamilton County. On May 29, he came in his vehicle to Iowa Falls to attend a funeral. While there he was arrested, as already indicated. There is no suggestion of evidence in the record that the defendant had ever operated his vehicle in Hardin County prior to that date. If he was not guilty of committing the offense on May 29, then, under the evidence, he was not guilty of any offense at any time within the jurisdiction of the Hardin County courts. If it were true, therefore, that he had operated his vehicle on April 26 in his home county while he was in default in the payment of his annual registration fee, this would not justify his conviction in Hardin County under this information.

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Reversed.

State v. Jacobs.

Supreme Court of Iowa, 1888. 75 Iowa 247, 39 N. W. 293.

From a judgment of conviction of maintaining a nuisance the defendant appealed.

Reed, J. - I. The following is a copy of the indictment: "The grand jury .... accuse Charles Jacobs of the crime of nuisance, committed as follows: The said Charles Jacobs, on the first day of May, 1886, and on divers other days or times between said first day of May, 1886, and the finding of this indictment, did wrongfully and unlawfully erect, continue and use a certain building and place, in which said building and place the said Charles Jacobs did keep intoxicating liquors with the intent then and there to sell the same in said building and place in violation of law, and did then and there sell the same in violation of law and contrary to the statutes in such cases provided. That the said building, and place is commonly known as a brewery, and is situated on the northeast quarter of the southeast quarter of the southwest quarter of section 35, township 90 n., range 19 w., 5 P. M., in Franklin county, Iowa." On the trial defendant objected to the introduction of any evidence in support of the indictment, on the ground that it was not charged therein that the offense was committed in Franklin county; and after the verdict was returned he moved in arrest of judgment on the same ground. The objection is not well founded. The indictment must aver that the offense was committed or is triable in the county in which it was found. But it is sufficient if it can be understood therefrom that the offense was committed within the jurisdiction. Code, sec. 4305, subd. 3. Technical exactness of language is not required. The last clause of the indictment alleges with sufficient certainty that the building and place which defendant is charged in the preceding part of the indictment with having kept and maintained, was situated in Franklin county. True, the averment is that said building is situated, etc., and, technically, this fixes its location at the time the indictment was found, while the offense was committed before that. But the indictment covers not only the day designated therein, but all other days between that and the day on which it was found. The averments, in effect, are that defendant did, on the twenty-sixth day of May, 1886, use, and continuously from that day to this has used, a building and place which is situated in Franklin county, for the unlawful purpose charged. Very clearly, we think, the averment as to the location of the building should be understood as referring to its location at the time of the unlawful use.

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On another ground the judgment was - Reversed.

State v. Daily.

Supreme Court of Iowa, 1901. 113 Iowa 362, 85 N. W. 629.

The defendant appealed from a judgment of conviction of the crime of seduction.

Deemer, J. - The indictment charges that the crime was committed "in the county of Iowa and the state of Iowa, or within Keokuk county, Iowa, within five hundred yards of the southern line of Iowa county, as nearly as the grand jury know and can state." After conviction defendant moved in arrest of judgment on the ground that the indictment failed to charge an indictable offense within the jurisdiction of or triable by the district court of Iowa county, in that it failed to aver venue. This motion was overruled, and the exception to this ruling presents the first matter for our consideration. It must appear from the indictment itself "that the offense is triable within the jurisdiction of the court." Code, section 5289. This must be shown by express averment, and not by inference or suggestion. Unless it clearly appears that the crime alleged was committed in the county where the indictment was found, or within 500 yards of the boundary thereof, the court has no jurisdiction. Code, sections 5154, 5158. There was, it is true, no necessity for averring that the crime was committed within 500 yards of the boundary of Iowa county; for, under an allegation that it was committed in Iowa county, the fact that the place of the offense was within 500 yards of the boundary thereof could be shown. State v. Pugsley, 75 Iowa, 742. But the pleader was not content to stand on this naked averment. He states that the crime was committed in Iowa county, or in Keokuk county, within 500 yards of the south line of Iowa county, as nearly as the grand jury knew and could state. Whether the offense as committed in Iowa or Keokuk county does not clearly appear. It may have been in either, but, if in Keokuk county, it does not sufficiently appear that it was within 500 yards of the south line of Iowa county. The averment is that, "as nearly as the grand jury knew and can [could] state," it was within the 500-yard limit. In so far as the allegation is concerned, the crime may have been committed within the jurisdiction of the court, or it may not have been. It was the duty of the grand jury to know and to state that the offense was committed at a place within the jurisdiction of the court to which their presentment was made. There are certain matters unknown to the grand jury that need not be stated in the indictment. As to such matters it is sufficient to say that they are unknown. Thus it is sufficient to state: That the Christian name of defendant is unknown. Jones v. State, 11 Ind. 357. That the name of a person other than accused was unknown. State v. Ean, 90 Iowa, 534; Geiger v. State, 5 Iowa 484. That the character of the instrument with which the crime was inflicted was unknown, and that various other matters, purely of description, were unknown to the grand jury. But this rule does not obtain as to jurisdiction. This fact must be stated, for it is necessary to know and to state facts showing jurisdiction in the court that is to try the case. It appears from the indictment that the grand jury did not know exactly

where the offense was committed. As nearly as they knew, it was, if in Keokuk county, within 500 yards of the southern boundary of Iowa county. Whether or not it was in fact committed within the jurisdiction of the Iowa county district court does not appear. The statment relates to the knowledge of the grand jury, rather than to the fact itself. We think the motion in arrest should have been sustained. As supporting our conclusions, see State v. Bushey, 84 Me. 460 (24 Atl. Rep. 940); Territory V. Do , 1 Ariz. 508 (25 Pac. Rep. 472). This view of the case relieves us of the necessity of considering other matters discussed by counsel. For the error pointed out, the judgment is Reversed.

(5) The Gist of the Offense.

When we say that a man has been indicted for a felony or a misdemeanor, or for murder or larceny or maintaining a nuisance, we have stated, to speak in terms of pleading, "not a fact but a conclusion of laws". The vital substance of the charge is not, for example, that the defendant has committed a felony nor that he has committed larceny, but rather that he has committed certain acts - which, we will suppose, constitute that particular felony called larceny.

State v. Davis.

Supreme Court of Iowa, 1875. 41 Iowa 311.

From a conviction of the crime of manslaughter the defendant appealed.

Miller, Ch. J. - The indictment upon which the appellant was tried is as follows:

"The State of Iowa,
vs.
Thomas E. Davis,

District Court of Pottawattamie County, Iowa.
November Term, 1873.

The grand jury of the county of Pottawattamie, in the name and by the authority of the State of Iowa, accuse Thomas E. Davis of the crime of manslaughter, committed as follows: For that the said Thomas E. Davis, on the 28th day of August, A. D. 1873, in the said county of Pottawattamie, and State of Iowa, willfully, deliberately, premeditatedly, and of his malice aforethought, and with intent to kill and murder one Charles Granville, feloniously did strike, stab, and cut the said Charles Granville across his (the said Charles Granville's) abdomen, with a certain knife which he, the said Thomas E. Davis, then and there had and held in his hand; then and there inflicting a mortal wound, of which said wound, so inflicted, as aforesaid, by the said Thomas E. Davis,

the said Charles Granville then and there died.

So that the grand jury aforesaid say that the said Thomas E. Davis, on the 28th day of August, A. D. 1873, at the county of Pottawattamie, in the State of Iowa, in manner and form as aforesaid, did willfully, deliberately, premeditatedly, and of his malice aforethought, feloniously kill and murder the said Charles Granville, contrary to the statutes in such case made and provided, and against the peace and dignity of the State of Iowa.

H. K. McJUNKIN,
District Attorney, Thirteenth Judicial District of Iowa."

The appellant, being duly arraigned, pleaded "not guilty." The court ruled this to be an indictment for murder in the first degree, and put the defendant on his trial accordingly, allowing the state to exercise ten peremptory challenges in forming the jury, and instructed the jury that under the indictment the defendant might be found guilty of murder, either in the first or second degree, if the evidence was sufficient, and made other rulings of similar character, all of which were duly expected to by appellant.

It is conceded by counsel for appellant, that the statement in the indictment, of the facts constituting the offense, does charge the crime of murder in the first degree; but that in charging the offense by name of manslaughter, the indictment is for the latter crime, and defendant can be tried only for that offense.

Section 4296 of the Code, which is the same as section 4650 of the Revision of 1860, requires that an indictment must contain "a statement of the facts constituting the offense," etc., but does not require that the offense intended to be charged shall be named in the indictment. The next section provides that the indictment" "may be substantially" in the form therein given, in which the defendant is directed to be accused of the crime by name, if it have one. It will thus be seen that under section 4297 of the Code (4651 of the Revision), the indictment may be in the form there given, which names the offense intended to be charged, but it does not require that it shall be so done.

In the State v. Hessenkamp, 17 Iowa, 25, where the indictment stated the facts constituting the offense, but did not name it by any technical name, it was held that the indictment was good for the crime described by the statement of facts therein, although not named.

The same holding is found in the State v. Baldey, 17 Iowa, 39. It was there said that "as a matter of form, it may be the better practice to name the offense in the indictment; a failure to do so will not render it vulnerable to a demurrer or other objections." In the State v. Ansaleme, 15 Iowa, 44, an indictment which did not correctly charge the name of the offense, but the charging part did

correctly define the offense, was held good; and in the State v. Shaw, 35 Iowa, 575, where the indictment charged the offense by name as a "nuisance," but the facts alleged as constituting the crime defined another offense, it was held that the indictment was good for the offense defined therein, and that the name "nuisance" given to it was mere surplusage, and under the statute no indictment is to be held insufficient for any surplusage, or repugnant allegation, ... where there is sufficient matter alleged to indicate clearly the offense, and the person charged. Code, section 4306, Subd. 4. Following these cases and the statute, we hold that the District Court did not err in rejecting the word "manslaughter" as surplusage, and putting the defendant on trial for the crime legally defined in the indictment, and the various rulings based upon this view of the statute were correct.

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Affirmed.

State v. Clark.

Supreme Court of Iowa, 1909. 141 Iowa 297, 119 N. W. 719.

The defendant appealed from a judgment of conviction of cheating by false pretenses, which judgment was entered against him after his motion for a new trial had been overruled.

Weaver, J. - .....

II. The appellant also demurred to the indictment because of its alleged failure to state the name of the owner of the property which is alleged to have been obtained by false pretenses, and does not state facts constituting an offense against the laws of this State. This demurrer was overruled, and error is predicated on such ruling. The material portion of the indictment is in the following language:

The said W. G. Clark on the 9th day of November, A. D. 1904, in the county of Appanoose and State of Iowa, did then and there unlawfully, willfully, feloniously, designedly and with intent to defraud one Ella Close, represent and pretend to said Ella Close, he, the said W. G. Clark, was the owner of certain property in Centerville, Iowa, to wit, lot nineteen (19) in Clark & Peatman's addition to the city of Centerville, Iowa, and that said property was free from all incumbrances of every kind, and then and there offered to convey to said Ella Close said property above described on payment to said W. G. Clark of a certain sum of money, to wit, nine hundred and fifty dollars, by good and sufficient warranty deed, and relying on said representation, and in pursuance of said

offer, the said Ella Close was then and there induced to pay to the said W. G. Clark the sum of nine hundred and fifty dollars in payment for the purchase of said property. Whereas, in truth and in fact, said land above described was not clear and free from all incumbrances, and the said W. G. Clark did not have a clear title to said land, there being at the time a mortgage in existence covering and including said property above described, said mortgage being for the sum of five hundred dollars and given by one C. J. Miller to one John Galbraith. And the said W. G. Clark falsely and fraudulently made said representations to said Ella Close, designedly and with intent to defraud, then and there knowing said representations to be false, and for the purpose of procuring from said Ella Close nine hundred and fifty dollars as aforesaid. And the said Ella Close believed said representations and pretenses so made to be true, and relied thereon, and was induced to deliver to said W. G. Clark said nine hundred and fifty dollars as above mentioned, and said Ella Close was thereby defrauded, contrary to law, and in such case made and provided and against the peace and dignity of the State of Iowa.

These allegations we think are open to the objection made by the appellant. While under our statutes and practice mere matters of form are not insisted upon with the strictness which marked the common law, there has not been, nor can there safely be, any relaxation of the rules which require a legal accusation of crime to state with clearness and certainty all the facts necessary to constitute a complete offense, and disclose to the accused the nature of the case which the State proposes to make against him. The substance of the alleged crime - that is, the facts which are necessary to constitute a complete offense - must still be stated with certainty and precision. Our statute expressly provides that an indictment "must contain a statement of the facts constituting the offense" (Code, section 5280), and must be direct and certain as to the particular circumstances of the offense when they are necessary to constitute a complete offense. Code, section 5282.

There are crimes which may be committed by the accused in the secrecy and solitude of his room which do not directly or immediately affect any other person, and to charge such a crime it is ordinarily necessary to do no more than to charge the doing of the act and the unlawful or felonious intent. For example, the accused may be charged with the unlawful possession of burglar's tools, under Code, section 4790; he may adulterate food with intent to sell the same in violation of Code, section 4982; or may keep intoxicating liquors with intent to sell in violation of the prohibitory law, and a charge of an offense of this class may be made without alleging the purpose of the accused to injure any particular person. But by far the larger class of public offenses are not of this character. In most instances the offense against the State is complete only as the wrongful act operates upon or affects some third person. For example, there can be no assault without a person assaulted, no bribery without a person bribed, no unlawful sale without a purchaser, and no

unlawful loaning of public moneys without a borrower, no larceny without trespass upon the property rights of another. State v. Allen, 32 Iowa, 248; State v. Brandt, 41 Iowa, 593, State v. Jackson, 128 Iowa, 543. It follows of necessity that in such cases the statement of the name of the third person without whom the crime can not be committed is essential to the statement of a complete offense, and an indictment which omits to state such name is demurrable; Buckley v. State, 2 G. Greene, 162; State v. McConkey, 20 Iowa, 574; State v. Allen, supra; People v. Minnock, 52 Mich. 628 (18 N. W. 390) State v. Murphy, 17 R. I. 698 (24 Atl. 473, 16 L. R. A. 550); State v. Brandt, supra.

It would seem to require no argument to show that the crime of obtaining money or property by false pretenses is of the latter class. The offense which the statute creates can be committed only by obtaining money, goods, or property belonging to another by means of some false pretense or false token, Code, section 5041. To charge the crime, it is therefore necessary to state the name of the person whose property rights have been thus trespassed upon. This principle has been often affirmed and reaffirmed by the authorities - just as in cases of robbery and larceny. Indeed, these three crimes - robbery, larceny, and obtaining property by false pretenses - have many essential elements in common. In each the gist of the offense is the felonious taking and conversion of the property of another; the difference between them relating solely to the means by which such taking and conversion are accomplished. In neither can there be any completed offense except as the property of some other individual is in fact obtained, and the name of such individual is descriptive of the offense, and must therefore be averred in stating the accusation. This was our holding in the comparatively recent case of State v. Jackson, 128 Iowa, 543. The rule thus approved finds sufficient support in Lechold v. State, 33 Ind. 484; Washington v. State, 41 Tex. 583; People v. Krummer, 4 Parker, Cr. R. (N.Y.) 217; Thompson v. People, 24 Ill. 66 (76 Am. Dec. 733); State v. Wasson, 126 Iowa, 320; State v. Lathrop, 15 Vt. 279; Jones v. State, 22 Fla. 532; Moulie v. State, 37 Fla. 321 (20 South. 554); Halley v. State, 43 Ind. 509; Thompson v. People 24 Ill. 60 (76 Am. Dec. 733); State v. Blizzard, 70 Md. 385 (17 Atl. 270, 14 Am. St. Rep. 366); State v. Smith, 8 Blackf. (Ind.) 489.

The Attorney General, in argument, concedes the rule above stated to be the law of this State, and further concedes that the indictment before us contains no specific allegation of the ownership of the money alleged to have been obtained by the appellant, but insists that the language actually employed is the equivalent of such specific allegation. But this can not be allowed. It is one of the most elementary rules of criminal pleading that in construing a charge of crime nothing is to be taken by intendment, nor can the lack of material averments in the indictment be supplied by mere matters or recitation or by inference from other statements. True, it is alleged that by means of the false representations Ella Close was induced to pay over to the appellant a certain sum of money; but it nowhere states whose money was thus paid or delivered

nor can we find that meaning in any of the language employed except as a matter of mere inference. Sill v. Regina, 16 Eng. L. & Eq. 375. That ownership is a material fact which must be expressly averred and not left to inference, see Moulie v. State, 37 Fla. 321 (20 South. 554). The demurrer should have been sustained.

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Reversed.

State v. Gallaugher.

Supreme Court of Iowa, 1904. 123 Iowa 378, 98 N. W. 906.

From a judgment of conviction of perjury, the defendant appealed.

Deemer C. J. - The defendant and one Charles Holada were jointly indicted for the crime of murder in the first degree. It was charged that they murdered one James Gallaugher, who was defendant's husband. Defendant was granted a separate trial, and as a result thereof was acquitted. Holada thereafter pleaded guilty to the crime of murder of the second degree, and was sentenced to the penitentiary for life. Defendant was a witness on her own behalf in the murder trial, and after her acquittal of the charge she was indicted by the grand jury of Johnson county for the crime of perjury. It was on this indictment that she was convicted, and from the judgment pronounced on the verdict returned therein she appeals.

The indictment charges that defendant knowingly, falsely, and corruptly testified on the murder trial as follows: "That the said Sarah Ellen Gallaugher never told Dr. Delano that her revolver was taken on the night of the murder of said James Gallaugher; that the said Sarah Ellen Gallaugher swore that she never planned or conspires with any one as to the manner and means of killing James Gallaugher; that she, the said Sarah Ellen Gallaugher, did not meet Charles Holada near the James Gallaugher house on the night of said murder; that she, the said Sarah Ellen Gallaugher, occupied the inside of the bed on which James Gallaugher was sleeping at the time the said James Gallaugher was shot and killed; that she, the said Sarah Ellen Gallaugher, swore at said trial that she never said before the coroner's jury that her revolver was somewhere about the place on the night of said murder; that she, the said Sarah Ellen Gallaugher, swore on the trial of said cause that she had never had sexual intercourse with Charles Holada at any time or place." The trial court, in its instructions, withdrew the charge that defendant testified falsely that she occupied the inside of the bed on which James Gallaugher was sleeping at the time he was killed, and the further charge that she testified falsely that she never

said before the coroner's jury that her revolver was somewhere about the place on the night of the murder, but did submit the other assignment of perjury charged in the indictment. In answer to interrogatories submitted by defendant's counsel, the jury returned the following special verdict, to wit: "Do you find that the defendant, Sarah Ellen Gallaugher, falsely testified that she had not conspired with any one to kill and murder her husband, the said James Gallaugher? Answer. No. W. K. Saxton, Foreman. Do you find that the defendant, Sarah Ellen Gallaugher, falsely testified that she did not have sexual intercourse with Charles Holada? Answer. Yes. W. K. Saxton, Foreman. Do you find that the defendant, Sarah Ellen Gallaugher, falsely testified that she told Dr. Delano that her revolver was taken on the night of said murder? Answer. No. W. K. Saxton, Foreman. Do you find that the defendant, Sarah Ellen Gallaugher, falsely testified that she had not met the said Charles Holada at or near the Gallaugher homestead on the night of the murder? Answer. No. W. K. Saxton, Foreman." It also found the defendant guilty of the crime charged, and upon that verdict judgment was pronounced.

While a great number of points are [redacted]ed, but one need be considered on this appeal, and that relates to the sufficiency of the indictment. It is well understood that an indictment for perjury should traverse the truth of the alleged false testimony. The rule, as generally expressed, is that the indictment must proceed by particular averments to negative that which is false, contradicting the matter alleged to have been falsely sworn to in express and specific terms. 18 Am. & Eng. Ency. of Law, section 915, 918, 919; McClain's Criminal Law, section 880; Archibald, Criminal Practice and Pleading (8th Ed.) page 1833; Com. v. Compton, 18 Ky., 479 (36 S. W. Rep. 116); State v. Mace, 76 Me., 64; Thomas v. State, 51 Ark. 138 (10 S. W. Rep. 193). The allegation in this indictment is that "defendant well knew she had criminal intercourse with Charles Holada," etc., and that "said Sarah Ellen Gallaugher, with full knowledge of their falsity," etc. Is this the equivalent of a statement that "whereas in truth and in fact she had had intercourse with the said Charles Holada, as she well knew," etc. The books give no uncertain answer to this interrogatory. See cases heretofore cited, and in addition the following: Com. v. Porter, 17 Ky., 554 (32 S. W. Rep. 138); Com. v. Wright, 16 Ky., 257 (27 S. W. Rep. 814); Morrill v. People, 32 Ill., 499; Perdue v. Com., 96 Pa. 311; Ferguson v. Com., 8 Ky. 257 (1 S. W. Rep. 435); State v. Nelson, 74 Minn. 409 (77 N. W. Rep. 223); Turner v. State, 30 Tex. App. 691 (18 S. W. Rep. 792); Com. V. Monahan, 9 Gray, 119; Henderson v. People, 117 Ill. 265 (7 N. E. Rep. 677); Gibson v. State, 44 Ala. 17; Thomas v. State, 54 Ark. 584 (16 S. W. Rep. 568) Com. v. Weingartner, 16 Ky. 221 (27 S. W. Rep. 815). Most, if not all, of these cases are directly in point, and expressly hold that an allegation such as the one found in the indictment in the case now before us is insufficient. The one last cited is particularly strong in its reasoning. It is there said: "An indictment, to be sufficient, for perjury, must negative specifically the truth of the

alleged false statement, and where this has not been done, 'it was said at common law,' the authorities hold such an indictment insufficient, and we have not been able to find a single precedent, either at common law or in our own state, where the assignment has been dispensed with." In that case the charge was that the statement made by the defendant was "willfully, deliberately false, and that defendant knew the same to be false when he made it." In Archibald on Criminal Pleading (Pomeroy's Notes, 8th Ed.) 1733, it is said, "The indictment must negative the matter sworn to by special averment, whereas in truth and fact," etc. We have only found one case holding to the contrary, and that is People v. Clements, 107 N. Y. 205 (13 N. E. Rep. 782.) We should be glad to follow that case, in view of the provisions of our Code, section 5290, which provides, in effect, that no indictment shall be held insufficient for any matter which was formerly deemed a defect, but which does not tend to prejudice the substantial rights of the defendant upon the merits, and would do so, but for the fact that section 5296, which relates specifically to indictments for perjury, provides, in effect, that indictments for this offense must contain "proper allegations of the falsity of the matter on which the perjury is assigned." In order to determine what are proper allegations of the falsity of the matter, we must look to the law as it existed when this statute was framed; in other words, to the common law and to the recognized forms thereunder. Turning to that law, we find that there must be a special traverse of the matter alleged to have been testified to; that is to say, the assignment should have been, "whereas in truth and in fact the defendant had had intercourse with the said Charles Holada as she well knew," etc. It is only by the merest inference or intendment that we find any such charge in this indictment, and even under our liberal system of criminal pleading it is well settled that an indictment cannot be aided by intendment or inference. State v. Potter, 28 Iowa, 554; State v. Clark, 80 Iowa, 517; State v. Jamison, 110 Iowa, 341. Averment of knowledge of falsity is not, in general, necessary except where the alleged false testimony was given upon information and belief. State v. Raymond, 20 Iowa, 582. Without further extending this opinion, it is sufficient to say that the indictment does not meet the requirements of the law, and that defendant's motion in arrest of judgment, based on this defect, should have been sustained. - Reversed.

Mr. Justice McClain dissented.

State v. Peder.

Supreme Court of Iowa, 1912. 154 Iowa 686. N. W.

The defendant appealed from a judgment of conviction of having entered into a conspiracy to do an illegal act injurious to public morals.

Ladd, J. - The specific charge made against the defendant is that he conspired with two other named persons with the unlawful purpose and intent to entice certain named young women from their homes, and from the persons having them in legal custody, for the purposes of prostitution and lewdness, and to cause said-young women to become prostitutes, and commit adultery and fornication. The case was tried to a jury, and defendant found guilty as charged.

I. The appellant challenged the sufficiency of the indictment, in that it fails to charge an indictable offense, and is void for duplicity. It is said, among other things, that the indictment fails to charge any overt act, and will not therefore sustain a conviction. The objection is unsound. It may be, and doubtless is, true that in some cases the offense of conspiracy is not complete without some overt act, and, when such is the case, the act must be alleged and proved. To this class of cases, Code, sections 5297 and 5490, on which counsel rely, are applicable, but the conspiracy charged in the present case is of statutory creation. See Code, section 5059, which makes it an indictable offense to conspire to do "any illegal act injurious to public morals." When, therefore, the accusation is made in the language of the statute, and the particular illegal act injurious to public morals, which act is the subject of the alleged conspiracy, is stated, the charge is complete. Counsel further argue that the indictment does not charge a conspiracy to do an illegal act, but is, in effect, an allegation of conspiracy to attempt the perpetration of an illegal act, and that this does not constitute an indictable offense. While the indictment is somewhat inartificially drawn, the criticism here directed against it is not justified. True, the pleader does in one case speak of a conspiracy to do an illegal act "by attempting to entice," etc., yet, when he comes to the charge of the specific act, he alleges, in substance, that said persons did conspire to take and entice the young woman named into a life of prostitution and lewdness, which enticement is clearly an offense against the provisions of Code, section 4942.

Bearing upon this branch of the case, it should also be said that the crime which is the object of the conspiracy need only be named in general terms, without stating the facts constituting it. See State v. Loser, 132 Iowa, 429; State v. Soper, 118 Iowa, 1.

For other reasons the judgment was - Reversed.

(6) Description of Third Persons and of Property.

The great majority of crimes result in special injury to some certain person or persons. Thus in assault and battery the person of the victim is injured; in burglary the peace and security of his dwelling is disturbed; and in larceny his possession of personal property is converted. In order that the particular offense may be chared properly, it is necessary that the name of the person injured be given, unless it is unknown to the grand jury, in which case

that fact must be stated. At common law any material variance between the name stated and that proved was fatal, but it is now provided that if the offense "is described in other respects with sufficient certainty to identify the act, an erroneous allegation as to the name of the person injured or attempted to be injured is not material" (5286, and see Supp. 13, 5289 (6)). In addition to the name of the person injured, unless the injury was to the person only there must be a description of the property involved. This is done by giving the name of property, the name by which it is commonly known being the one which should be used. Where the value is material as in larceny, that also should be given. For example: "one mare, the personal property of the said George E. Warriner, which said mare was then and there of the value" etc. was held to be a "sufficient description" (State v. Friend (1891), 47 Minn. 449, 50 N. W. 692); and an indictment for breaking into a store building was upheld in which the description was: "A certain store, known as the 'Grange Store', at Belle Plaine, Iowa, of W. A. Parris" (and other persons whose names were given - State v. Velinek (1895), 95 Iowa 420, 64 N. W. 259).

State v. Bitman.

Supreme Court of Iowa, 1862. 13 Iowa 485.

The defendant appealed from a judgment of conviction of assault and battery.

Baldwin, C. J. - The information upon which the defendant was arrested, tried and convicted, charges him with cruelly and inhumanly whipping and beating his own child, being about three years old.

A demurrer to this information was filed in the justice's court presenting several objections to its sufficiency, only two of which we deem it important to consider: first, because it did not charge the public offense of assault and battery; second, because the name of the person upon whom the offense was said to have been committed, was not given.

This demurrer was overruled by the justice, and the bill of exceptions shows that upon appeal, the same objection was made and overruled in the District Court.

The information is not objectionable upon the first ground named. The language used is sufficient to indicate that the offense had been committed. It is not required that the information should state in so many words that the defendant was guilty of the offense of an assault and battery. It is the right of a parent to chastise his child, but when such chastisement amounts to cruelty or inhumanity, or where, as the court below charged the jury, the parent or master goes beyond the line of reasonable correction, his conduct becomes more or less criminal.

Cruelly and inhumanly whipping implies an unlawful and willful assault and battery. Any words used in the information which substantially and plainly set forth the acts of the defendant which amount to an offense, are sufficient.

The second objection is, that the name of the person upon whom the offense was committed is not given. This omission renders the information defective. It would, without doubt, invalidate an indictment, if the State should fail to allege therein upon whom the offense had been ommitted.

The form of an information, as given in § 5058, of the Revision, seems to contemplate that the act or omission constituting the offense with the venue and names and date, should be stated with as much precision as in an indictment. The defendant should be advised of the name of the person upon whom the assault has been committed, so that he can prepare his defense accordingly.

The information should be so specific that if the defendant is so convicted or acquitted he could plead such conviction or acquittal in bar of any further prosecution for the same offense.

Reversed.

State v. Feuerhaken.

Supreme Court of Iowa, 1895. 96 Iowa 299, 65 N. W. 299.

Having been convicted of the crime of receiving stolen goods, the defendant appealed.

Deemer, J. - Defendant was charged with having received and aided in concealing certain dry goods, consisting among other things, of sixty-three hoods, ninety-four handkerchiefs, twenty and one-half yards of veiling, one hundred and sixty-six yards of lace, ten hose supporters, eight belts, and other property, of the aggregate value of eighty-two dollars and ninety-three cents. It is further charged that this property was all stolen from the Chicago & Northwestern Railway Company, and that the defendant knew it was stolen at the time he received it. The state relied upon the testimony of Adolf Kolb and Peter Knecht, who, it seems, stole the property, together with the testimony of other witnesses, tending to show that the goods were actually stolen, that they were concealed by the defendant, and that, upon being accused of having received the stolen goods, defendant at first denied it, but afterwards disclosed their whereabouts to the officer who was searching therefor.

..... It is said the indictment is bad because it does not state of whom the goods were received, nor who the defendant aided in concealing them, nor that defendant received them with a

felonious intent, or with intent to deprive the owner thereof. The indictment, however, does charge a felonious intent to defraud the Chicago & Northwestern Railway Company. It is not necessary to name the person of whom the goods were received. There is no such requirement in the statute, and such a statement is not needed to enable a person of common understanding to know what is intended, or the court to pronounce judgment, upon a conviction, according to the law of the case. The case of Shriedley v. State, 23 Ohio St. 139, is directly in point. See, also, 2 Bishop, Cr. Proc. section 927.

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Affirmed.

State v. Thompson.

Supreme Court of Iowa, 1865. 19 Iowa 299.

From a judgment of conviction of the crime of forgery the defendant appealed.

Cole, J. - The indictment charges, that the defendant, "with intent to defraud F. B. Skiff, a resident of Clinton county, did falsely make and forge an instrument in writing, in the language and figures following, to wit: 'Ravenna, Aug. 6th, 1856, received of F. B. Skiff, a promissora not gainst S. A. Thompson, bairing date Feby 12th, 1850, of which i am to have $100.00 on hundred dollars when collected, or i am to pay fifty dollars at the end of thre years from date, F. B. Skiff.' The said writing, purporting to be the act of the said F. B. Skiff, and to create a pecuniary demand against the said F. B. Skiff contrary, &c."

On the trial, the State offered to read in evidence to the jury, an instrument of writing, precisely like the copy set out in the indictment, except that it was signed T. B. Skiff instead of F. B. Skiff. The defendant objected, but the court overruled the objection and admitted the evidence; and such ruling is assigned as error.

The technical exactness of the common law, as enforced in criminal prosecutions, whereby many guilty persons escaped the just penalties due their crimes, and which justly became the reproach of that system of jurisprudence, has been wisely superseded in this State by the Revision of 1860. See Revision, §§ 4650, 4656, 4657, 4659, 4660, 4667 and 4925.

It is now sufficient, if the offense is charged in ordinary language, in such manner as to enable a person of common understanding to know what is intended. Rev., §§ 4650, 4659. So, if the

proof offered to support the charge is such as would not mislead a person of common understanding, it should be held competent, since no greater strictness ought to be required in proving an offense than is required in charging it.

By the application of the statutory standard of capacity, to the language used in the indictment to charge the offense, it will be seen that there is no possible chance of misleading the defendant by the use of the signature T. B. Skiff, instead of F. B. Skiff, to the alleged forged instrument, or in admitting in evidence the paper signed T. B. Skiff, to prove the charge alleged as F. B. Skiff. By reference to the language used in the indictment immediately preceding and immediately following the copy of the alleged forged instrument as set out therein, it will be seen that the defendant is charged with forging the instrument with intent to defraud F. B. Skiff; and that the said writing purported to be the act of F. B. Skiff, and to create a pecuniary demand against the said F. B. Skiff.

Now, since the forging of the signature of T. B. Skiff, would not show an intent to defraud F. B., nor purport to be the act of F. B., or to create a demand against F. B., it becomes, in the light of a "common understanding", tolerably reasonable, that the letter T. is a mere clerical error and was intended for F. We think that both the spirit and language of the Revision justifies the ruling of the District Court; and it is especially provided by the Revision, § 4925, that "the Supreme Court must, on appeal, examine the record, and without regard to technical errors or defects, which do not affect the substantial rights of the parties, render such judgment on the record as the law demands." Without, therefore, regarding the technical defect complained of, we affirm the action of the District Court in this particular.

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Affirmed.

State v. Kiefer

Supreme Court of Iowa, 1915. 172 Iowa 306, 151 N. W. 440.

The defendant appealed from a judgment of conviction of cheating by false pretenses.

Ladd, J. - I. The accused is charged in the indictment with having obtained, by false pretenses, a promissory note of $700, bearing date February 15, 1913, and due six months after date, executed by D. E. Stoner to the defendant, and $700 in money.

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III. The note alleged to have been obtained by false pretenses was described in the indictment as having been given by D. B. Stoner. The note introduced in evidence, over objection, bore the name of Stella Stoner also as maker, and on this ground, the defendant argues that there was a fatal variance between the allegations and the proof. If the variance is to be regarded as material, the conclusion necessarily follows that it was fatal. On the other hand, if the description is sufficiently full and definite to identify the transaction and inform the accused of the precise charge against him, a mere technical inaccuracy will not be permitted to defeat the prosecution. People v. Reed (Cal.), 11 Pac. 676, is directly in point in declaring that such a variance is fatal, the court saying:

"The indictment or information should set out with reasonable certainty the pretenses and fraudulent representations by which the party injured was defrauded of his property, and such specific description of the property obtained as will identify it, and give to the defendant notice of what he is required to meet. And between the allegations thus made and the proofs there should be such a correspondence that, when the latter are adduced, it can be said that the former are substantially established. In the present case, there was a wide departure from the necessary correspondence between the allegata and probata. The proofs established another offense, separate and distinct from that charged. The property obtained by the fraudulent practices of defendant was different from that described in the indictment. This difference was so significant that in a civil action it would have been fatal to a recovery.

In Copeland v. State (Ala.), 12 So. 181, a contract was alleged to have been made use of to defraud, and to have been signed by J. D. Copeland, when it in fact was made by John D. Copeland, and W. F. Copeland, and this was adjudged a fatal variance.

The principle was involved in State v. Cadwell, 79 Iowa 473. There the indictment charged that the accused had obtained property by falsely representing that he had money on deposit with a bank and drawing a draft thereon in favor of the person alleged to have been defrauded; but the proof showed that the draft was made by the "Boyer Valley Bank," a partnership composed of the accused and another, that he drew the draft in its name, and that any deposit it had was in the name of the Boyer Valley Bank and not in that of the accused. The variance was held to defeat conviction.

A different conclusion was reached in Headley v. State (Ala.), 17 So. 714, but owing to a statute of that state. A promissory note such as alleged is not identical with that adduced in evidence, and this being so, there was a material variance between the property alleged to have been obtained and that proven, and the court erred in submitting the issue as to whether the promissory note in question

was obtained by false pretenses. Any prejudice was obviated, however, by the special findings of the jury that the note was given to defendant for the purpose of taking up another and was used for that purpose.

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But for other error the judgment was - Reversed.

State v. Porter.

Supreme Court of Iowa, 1896. 97 Iowa 450, 66 N. W. 745.

The defendant appealed from a judgment of conviction of the crime of burglary.

Kline, J. - The indictment in this case charges the crime to have been committed by breaking and entering a certain office in a room in the second story of a two-story building owned by L. Hecht, and that one E. M. Sherman had possession of said office. It is claimed - First, that it was not shown who owned said building; second, that the evidence showed that the building was a three-story, instead of a two-story, building; third, that it appeared from the evidence that the possession of the office or room was in the Sherman Nursery Company; and therefore there was a fatal variance between the allegations of the indictment and the proofs.

Under our statute (Code, section 4302), when an offense involves the commission, or attempted commission, of an injury to the person, or property, and is, in other respects, described with sufficient certainty, an erroneous allegation as to the name of the person injured is not material. A reference to the following cases will show how the statute has been applied: State v. Emmons, 72 Iowa, 265 (33 N. W. Rep. 672); State v. Rivers, 68 Iowa, 611 (27 N. W. Rep. 781); State v. Short, 54 Iowa, 392 (6 N. W. Rep. 584); State v. Golden, 49 Iowa, 48; State v. Semotan, 85 Iowa, 57 (51 N. W. Rep. 1161); State v. Franks, 64 Iowa, 39(19 N. W. Rep. 832) State v. Teeter, 69 Iowa, 717 (27 N. W. Rep. 485); State v. Jelinek, 95 Iowa, 420 (64 N. W. Rep. 259); State v. Lee, 95 Iowa, 427 (63 N. W. Rep. 284.)

It is contended, however, that the crime in this case is not in other respects sufficiently described. The fact that the building was charged to be a two-story building, instead of a three-story building, is not a fatal variance.

Nor is it a fatal variance that the proof showed that the office or room, was alleged to be in possession of Sherman, when in fact it was rented by a corporation, of which Sherman was president, and

occupied by him and in his possession as such officer. See State v. Semotan and State v. Jelinek, supra.

The court instructed the jury on the theory that the claimed variances, if they existed, were not material, and would not authorize an acquittal of the defendant. There was no error in so doing. All of the objections raised impress us as technical and without merit.

Affirmed.

(7) Written Instruments or Papers.

State v. Johnson and Johnson.

Supreme Court of Iowa, 1868. 26 Iowa, 407, 96 Am. Dec. 158.

From a judgment of conviction of forgery, the defendant appealed.

Wright, J. - .....

Having said this much as to the general nature of this offense, and its definition in law, we turn to the objections made by the appellant's counsel to the record and proceedings in the court below. And, first, it is insisted that the indictment is insufficient inasmuch, as it does not set forth a copy of the instrument alleged to have been forged, but only the purport and effect of the same. The argument is, that it is never sufficient to allege in an indictment for forgery, that the instrument is of the "purport and effect following," but that an accurate copy must be set out in word and figures, preceded, it may be, with the word "tenor," which always means an exact copy; while the words "purport and effect," mean only the substance, etc.

Counsel have urged the position with most commendable zeal, and no little ability, and yet, upon several grounds, we feel constrained to hold it untenable. We concede the necessity, no excuse being shown, for setting forth the instrument. This was held in the State v. Callendine (8 Iowa, 288), and its correctness is not doubted. But it was held in Houghton's Case (8 Mass. 110), to which we are referred by appellant's counsel, "that there need be no technical form of words for expressing that it is so set forth." And while we concede that the precedents are in favor of the form which uses the "tenor" rather than "purport and effect," we have no thought that under our statute a defect of this character would vitiage the indictment. These words might be rejected, without in the least changing the meaning of the pleader. Then, again, there is a copy given. The State did not stop with giving a description of the instrument; as that it was of such a date, signed by such a party, and

contained language having a particular purport and effect; but there is a copy set out, and the court is thus able to see whether it does or does not come within the statute. Not only so, but the duty is to look at the substantial rights of the defendant, to see that all these are protected, and yet not stand upon any purely technical ground. Adopting the language used in a former case in this court, we remark that the "technical exactness of the common law, as enforced in criminal prosecutions, whereby many guilty persons escaped the just penalties due their crimes, and which justly became the reproach of that system of jurisprudence, has been wisely superseded in this State." See Revision, § 4650, 4656, 4657, 4659, 4660, 4667, 4925.

It is now sufficient if the offense is charged in ordinary language, in such manner as to enable a person of common understanding to know what was intended. State v. Thompson, supra. The correctness of this language is abundantly shown by the statute itself, in the several sections cited, and indeed it has been so often recognized both before and since that decision, that we shall not stop to support it by either cases or argument. There is need of certainty, we concede. It is important that one charged with crime should know fully what it is he must defend against. There should be such exactness in the facts charged constituting the offense, that the acquittal or conviction can be pleaded in a subsequent prosecution for the same offense. If this knowledge is given, and this protection secured, there is but little room for injury, mistake or surprise. And applying this thought to the indictment, it surely requires no argument to show that the defendant could know - any one of the commonest understanding could know - and understand the exact nature, tenor, indeed every part of the instrument upon which the forgery was assigned; and there could be no trouble in pleading an acquittal or conviction thereon in bar of any subsequent prosecution based upon the same instrument. The use of the word "tenor" might have been more technical, but it would scarcely have conveyed to the common understanding a greater certainty of meaning.

Certain it is that its omission cannot, by possibility, tend to prejudice the substantial rights of the accused upon the merits; and it is only such defects which can be regarded by us, or which can be held sufficient to vitiate the indictment. Revision, § 4660-5. Remarking that this is particularly true when the objection, as in this case, is first made in the motion in arrest, we turn to the only other point made by counsel, that the instrument described is not the subject of forgery under the laws of this State.

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Affirmed.

State v. Henderson.

Supreme Court of Iowa, 1907. 135 Iowa, 499, 113 N. W. 328.

The grand jury found an indictment against the defendant in which it was averred that he "was then and there the cashier and an officer or employee of the Marengo Savings Bank, a corporation duly incorporated under the laws of the State of Iowa for a general banking business, did knowingly, willfully and feloniously make a false statement of what purported to be the actual financial condition of the said Marengo Savings Bank to the directors of the said bank, they being the managers of the business and property of the said bank and authorized by law to examine its condition, which statement was made with intent to deceive the said directors of the said Marengo Savings Bank, as aforesaid; that said statement was false and failed to show the true condition of the said savings bank; that said defendant in said statement reported the overdrafts of individuals to be four hundred and sixty-six dollars and twenty-eight cents ($466.28), whereas, in truth and in fact, the same exceeded said amount by the sum of, to-wit; fifteen hundred dollars ($1,500), and, further, the said statement showed that there was due from banks to the said Marengo Savings Bank the sum of seventeen thousand twelve dollars and fifty-eight cents ($17,012.58), whereas, in truth and in fact, there was, to-wit, the sum of fifteen hundred dollars less due to the said Marengo Savings Bank from banks; that the said statement was made by the said defendant with the intent to deceive the directors of the said Marengo Savings Bank, contrary to the statute in such cases made and provided." The defendant demurred on several grounds, one of them being that "it nowhere appears in said indictment that said statement was oral, or in writing, and if in writing the same is not set forth in the indictment, nor is the same described in such a way as to enable the defendant to prepare for trial."

Ladd, J. - .....

The rule is elementary that, where the basis of an offense is a written instrument, it should be set out in haec verba, or else the substance stated. See Langford v. State, 45 Ala. 26; Baker v. State, 14 Tex. App. 332. This last was done by pointing out wherein the alleged statement was false, i.e., in representing the individual overdrafts on the bank as $466.28, whereas they exceeded the sum of $1,500; and the amount due from other banks as $17,012.58, whereas $1,500 less was due therefrom. But it was not alleged whether it was in writing or oral. This is not ground for demurrer, for the indictment would be good in either event. The false statement having been described with sufficient definiteness to point out the particular offense charged, another remedy is open to the accused if it shall become important for him to know whether the statement is in writing, and, if so, to examine it.

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On other grounds the indictment was held to be demurrable.

(8) Intent; Knowledge etc.

Common law indictments knew a number of magic words. Thus there was no word or phrase which would take the place of "traitorously" in indictments for treason; or "burglariously" in indictments for burglary; or "piratically" in indictments for piracy; or "of his malice aforethought" in indictments for murder; or "feloniously ravished" in indictments for rape; or "feloniously" in any indictment for a felony. There were many others. But under the Code the question is not whether some particular word was used but whether there is "a statement of the facts constituting the offense in simple and concise language" (5280) See also 5290 and Supp. 13, § 5289).

It is not necessary for the indictment to charge the mens rea but if a specific intent or state of mind is an essential element of the crime its omission will be fatal. Such an intent or state of mind is a fact, without which such crime does not exist. In like manner if some particular knowledge is made an element of the crime, as distinguished from a fact showing the mens rea, such knowledge must be stated.

State v. Harrison.

Supreme Court of Iowa, 1891. 82 Iowa 716, 47 N. W. 777.

The defendant appealed from a judgment of conviction of assault with intent to inflict great bodily injury.

Given, J. - The only question presented by this appeal is whether the indictment charges an assault with intent to inflict a great bodily injury. The charge is that defendants "did with deadly weapons, to-wit, certain clubs and sticks, and rails, the particular description of which is unknown to this grand jury, then and there in the hands of the said Robert Harrison, Noah Harrison, Henrietta Harrison and Alcina Harrison, upon one James Frakes, make an assault with the intent then and there unlawfully and feloniously to beat, strike, wound and bruise, and did inflict upon the head and person of the said James Frakes a great bodily injury, contrary to and in violation of law." In State v. Clark, 80 Iowa, 517, it was held that the indictment did not charge an assault with intention to inflict a great bodily injury. The charge in that case was that the defendant "did, with a deadly weapon, to-wit, a certain billiard cue, the particular description of which is to this grand jury unknown, which the said Edward Clark then and

there held in his hands, make an assault upon one A. B. Haskins with intent then and there wickedly, unlawfully, maliciously and feloniously to strike and bruise, and did inflict upon the person of said A. B. Haskins a great bodily injury." It will be seen that, as far as the charge of intent is concerned, the indictments are identical. The intent charged in this case is to beat, strike, wound and bruise, but does not charge an intent to inflict a great bodily injury. For the reasons given in State v. Clark, the judgment of the district court must be

Reversed.

Rothrock and Robinson J. J. dissented.

State v. Smith.

Supreme Court of Iowa, 1893. 88 Iowa 1, 55 N. W. 16.

From a judgment of conviction of the crime of knowingly receiving stolen goods, the defendant appealed.

Kinne, J. - I. The indictment charges "that C. W. Smith, on or about the fifth day of April, 1889, in the county of Boone, state of Iowa, twenty-two pairs of striped pants, not all of same color, but all striped, each pair of the value of five dollars, and all of the value of one hundred and ten dollars, of the goods and chattels and property of Mish & Company, a partnership, the members of which are J. J. Mish and S. L. Mish, then and there being lately feloniously stolen, did receive, buy and conceal, with the intent to defraud the said Mish & Company, owner thereof, and he, the said C. W. Smith, then and there well knowing said goods and chattels, and property to have been feloniously stolen, as aforesaid, contrary to the statute," etc.

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III. Claim is made that the court erred in giving to the jury the second and fourth paragraphs of its charge. The alleged error is based on the fact that in instructing the jury as to what constituted the material allegations of the indictment, which must be established beyond a reasonable doubt, the question of the defendant's intent was ignored. Our statute says nothing about the intent. Under it the material facts which must be established are, that the goods must have been the property of the person mentioned in the indictment; that they had been recently stolen, taken, and carried away, by some person or persons, from the said owners; that the defendant bought, received, or concealed them, knowing them to have been stolen; and that said acts were done in the county and state, within three years immediately prior to the finding of the indictment in the case. The instruction contained all these facts. They are all that are essential, under the statute, to constitute the crime charged. Many authorities are cited from other states, holding that intent is a necessary ingredient of this crime. Whatever the law may be in that respect elsewhere, intent is not, by

our statute, a necessary fact to be averred or proved in such a case. Even if intent was necessary to be shown to establish the defendant's guilt, it is difficult to conceive how he could have received, purchased, and aided in concealing stolen goods, knowing them to have been stolen, without having a guilty intent. State v. Turner, 19 Iowa, 144; State v. Lane, 68 Iowa, 384. The jury were plainly instructed as to the necessity of finding, beyond a reasonable doubt, every fact which, under the statute, is necessary to constitute the crime charged. More than this is not required.

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Affirmed.

State v. Judd.

Supreme Court of Iowa, 1906. 132 Iowa 296, 109 N. W. 892.

Having been convicted of the crime of incest, the defendant appealed.

Ladd, J. - The indictment charged that the defendant "did then and there feloniously have carnal knowledge of one Homer Richardson, the said Homer Richardson then and there being the brother of said defendant's mother." It is contended that the use of the word "feloniously" is equivalent to charging that the act was done knowingly; i. e., with the knowledge on the part of the defendant of her relationship to Homer Richardson, and that, having so alleged, it was incumbent on the State to prove the allegation as alleged. At the common law the use of the word "feloniously" or its equivalent in charging felony was indispensable to an indictment for felony. Fowler v. State, 41 Mass. 570; Mott v. State, 29 Ark. 148; State v. Williams, 30 Mo. 364; Kaelin v. Com., 84 Ky. 354 (1 S. W. 594); State v. Rechintz, 20 Mont. 488 (52 Pac. 264). The authorities seem to be in conflict as to whether the same rule prevails when the offense is one created by statute. 1 Bishop on Crim. Proc. 534. All that is necessary in this State is to allege the facts constituting the offense in ordinary and concise language with such certainty and in such manner as to enable a person of common understanding to know what is intended and the court to pronounce judgment according to law upon a conviction. Section 5289, Code. And in so doing it is necessary to include the word "felonious" or "feloniously" in charging a felony (State v. Griffin, 79 Iowa, 568); or "burglarious" or "burglariously" in charging burglary (State v. Short, 54 Iowa, 392). Though unnecessarily inserted in the inditment, however, such words ought to be given no greater effect than would have been accorded them under the common-law system of pleading. As here employed

"feloniously" would have imported no more than that the act charged was a felony and no other significance should be accorded the word under the Code system of pleading a vogue in this State. This is equivalent to saying that, if it is not descriptive of the identity of what is legally essential to the charge in the indictment, the word may be rejected as surplusage. Section 5290, Code. See State v. Newland, 7 Iowa, 242; State v. Hesner, 55 Iowa, 494; State v. Verden, 24 Iowa, 126; State v. Bailey, 31 N. H. 521; People v. Myers, 20 Cal. 76.

Even were it to be construed as meaning knowingly or with knowledge there is authority for treating it as surplusage also. 1 Chit. Crim. Law 241; 1 Bishop, Crim. Proc. section 505; Com. v. Squire, 1 Metc. (Mass.) 258. Butthis we do not determine, as "feloniously" in the connection used cannot be so understood and amount to no more than saying the crime charged was a felony. Nor, in the absence of that word, was affirmative proof of knowledge on the part of the State necessary in order to convict. Incest appeared to have been a capital offense in the time of the commonwealth in England, but the statute was not renewed at the Restoration, and thereafter it was not an indictable offense, the punishment thereof being relegated to the ecclesiastical courts. State v. Keesler, 78 N. C. 469.

The crime is purely statutory, and, as scienter is not included in the definition contained in the section of our Code defining it, it is not an element of the crime and therefore need not be alleged in the indictment nor affirmatively proven in order to justify a conviction. State v. Rennick, 127 Iowa, 294; State v. Glindemann, 34 Wash. 225 (75 Pac. 800, 101 Am. St. Rep. 1001); State v. Dana, 59 Vt. 614 (10 Atl. 727); Simon v. State, 31 Tex. Cr. R. 186 (20 S. W. 399, 716, 37 Am. St. Rep. 802); See State v. Newton ; 44 Iowa, 45, 16 Am. & Eng. Ency. of Law (2d Ed.) 138; 22 Cyc. 47. In State v. Pennington, 41 W. Va. 599 (23 S. E. 918), the point was not involved. Whether proof of absence of knowledge might be shown by way of defense is not raised by the record and therefore is not considered.

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Affirmed.

State v. Thurman.

Supreme Court of Iowa, 1885. 66 Iowa 693, 24 N. W. 511.

Having been found guilty of murder in the second degree, the defendant filed a motion in arrest of judgment on the ground that the indictment did not charge that the acts causing the death were done with malice aforethought. The charge was that the defendant "did willfully, maliciously and feloniously administer or cause to be taken by one Ella Vaughn, then and there being pregnant with child, a quantity of some noxious drug or substance .... with the

specific intent then and there to produce a miscarriage and abortion of said Ella Vaughn, ... from the effects of and by reason of said drugs so administered the said Ella died." From a judgment entered on the verdict, the motion having been overruled, the defendant appealed.

Seevers, J. - The statute provides that whoever kills any human being with malice aforethought, either express or implied, is guilty of murder. Code, § 3848. The indictment must therefore charge that the killing was done with malice aforethought; but it is not essential that these identical words be used. It is sufficient if words of the same import are used; or, if from the language used in the indictment it clearly appears that malice aforethought is charged, or can without doubt be implied, the indictment is sufficient. It is clearly charged that the drugs were administered, and the act of thrusting the instrument into the body was maliciously done. Now, does the indictment charge that the acts were done with malice aforethought; that is to say, does it sufficiently appear that the defendant deliberated and thought before he did the act which caused the death? We think the indictment so charges. The drugs were administered, and the instrument thrust into the body of the deceased, with the specific intent to produce an abortion. This clearly implies previous thought and deliberation. Such an intent could not have been formed or have existed unless it had been contemplated and deliberated upon before the drugs were administered. The indictment in this case is not materially different from that in State v. Neeley, 20 Iowa, 108, which it was held was sufficient.

Affirmed.

State v. Andrews.

Supreme Court of Iowa, 1891. 84 Iowa 88, 50 N. W. 549.

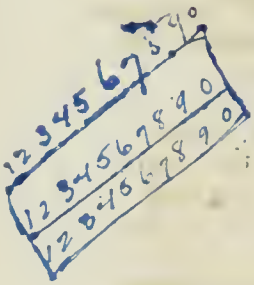
Having been convicted of manslaughter the defendant appealed.-

Robinson, J. - I. The indictment contains two counts, the first of which is as follows: "The grand jury of the county of Sioux and state of Iowa, in the name and by the authority of the state of Iowa, accuse James Andrews of the crime of murder in the first degree, committed as follows: The said James Andrews, at the county of Sioux, and state of Iowa, on the twenty-second day of August, A. D. 1888, feloniously, wilfully, deliberately, premeditatedly, and of his malice aforethought, in and upon one Charles O'Connor, then and there being, did make an assault, and that he, the said James Andrews, then and there, with a certain deadly weapon, being a revolver, then and there charged and loaded with gunpowder and one leaden bullet, which said revolver he, the said James Andrews, in his hands then and there had and held, then and there feloniously, wilfully, deliberately, premeditatedly, and of

his malice aforethought did discharge and shoot off to, against, and upon the said Charles O'Connor; and that the said James Andrews, with the leaden bullet aforesaid, out of the revolver aforesaid, then and there, by the force of the gunpowder aforesaid, by the said James Andrews discharged and shot off as aforesaid, then and there feloniously, wilfully, deliberately, premeditatedly, and of his malice aforethought did strike, penetrate, and wound him, the said Charles O'Connor, in and upon the left side of the belly of him, the said Charles O'Connor, then and there with the leaden bullet aforesaid, so as aforesaid discharged and shot out of the revolver aforesaid, by the said James Andrews, in and upon the left side of the belly of him, the said Charles O'Connor, one mortal wound of the depth of twelve inches, and of the breadth of half an inch, of which said mortal wound the said Charles O'Connor from the twenty-second day of August, A. D. 1888, to the twenty-third day of August, A. D. 1888, aforesaid, at the town of Hawarden, in the county and state aforesaid, did suffer and languish, and languishing did live; on which said twenty-third day of August, A. D. 1888, aforesaid, in the year aforesaid, in the county and state aforesaid the said Charles O'Connor of the said mortal wound died; and so the jurors aforesaid upon their oaths do say that he, the said James Andrews, him, the said Charles O'Connor, in the manner and form aforesaid, feloniously, wilfully, deliberately, premeditatedly, and of his malice aforethought did kill and murder, contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the state of Iowa." The second count charges the same offense, with an unimportant difference in the language employed to describe the weapon used and the wound inflicted; but so far as its legal effect is involved in this appeal, it is subject to the same rules of construction as the first count, and need not be set out at length.

The charge of the court submitted to the jury the question of the guilt of the defendant of the crime of murder in the first degree, and of that the appellant complains, and insists that the indictment sufficiently charges no higher offense than that of murder in the second degree. An examination of the indictment shows that it accuses the defendant of having inflicted the wound which caused the death of O'Connor, "feloniously, deliberately, premeditatedly, and with malice aforethought," but, except in the concluding part, it does not charge that the murder was so committed. The case is within the rule announced in State v. McCormick, 27 Iowa, 403, and, following that case, we must hold that the indictment does not so charge the defendant with the crime of murder in the first degree as to authorize his trial for that offense.

It is claimed on the part of the state that the concluding paragraph, "and so the jurors aforesaid, upon their oaths, do say that he, the said James Andrews, him, the said Charles O'Connor, in the manner and form aforesaid, feloniously, wilfully, deliberately, premeditatedly, and of his malice aforethought, did kill and murder, contrary to the form of the statute in such cases made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and provided, and against the peace and dignity of the state of Iowa," cures the defect. That paragraph, however, is a formal part of the indictment, not designed to charge an independent fact, but to express a conclusion derived from the statement of alleged facts which preceded it. In a similar case, in speaking of the material ingredients of the crime of murder in the first degree, the supreme court of Ohio used the following language: "A statement of any one of these facts or circumstances as a legal result, or by way of inference or conclusion from antecedent averments, is bad, and fatal to the indictment." Fouts v. State, 8 Ohio St. 113. That rule was followed in Kain v. State, Id. 316, and Hagan v. State, 10 Ohio St. 459. These cases were cited, and they announced approved, by this court in State v. McCormick, supra. The rule was again followed in State v. Hatkins, 27 Iowa, 415, and appears to have been followed in State v. Knouse, 29 Iowa, 118. It must now be regarded as the law of the state. See, also, State v. Record, 56 Ind. 107. It was reversible error to put the defendant upon trial for an offense of a higher degree than that with which he was charged, even though the indictment charged the offense of which he was convicted. State v. Boyle, 28 Iowa, 525; State v. Knouse, 29 Iowa, 118.

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Reversed.

(9) Statutes.

Since the court is bound to take judicial notice of all public statutes, it is not necessary that an indictment on a public statute should recite the act. It need not even expressly refer to the statute. But it is indispensible that facts be stated which, if established by the proof, will show that an offense has been committed, and the fact that the crime is statutory in no way alters this rule. We do not have two types of indictments in this state - those based on the common law and those under statutes - for the reason that all our offenses are statutory (Estes v. Carter (1860), 10 Iowa 400).

State v. Seamons.

Supreme Court of Iowa, 1848. 1 G. Greene 418.

From a judgment quashing an indictment the state appealed.

Opinion by Greene, J. Indictment with intent to inflict a bodily injury. The first count, so far as applicable to the present

inquiry, charges "that Albert H. Seamons, of, &c., on the seventh day of November, A.D., 1847, with force and arms, at, &c., did unlawfully, wilfully, and feloniously, make an assault upon Henderson Boggs with a deadly weapon, with an intent then and there to inflict upon , &c., a bodily injury, without any considerable provocation appearing, against the peace," &c. The second count contains all the material averments of the first, with the additional charge that the assault was made "with a large rock of the weight of two pounds, the same being a deadly instrument, with an intent, "&c.; when the circumstances of the assault evinced "an abandoned and malignant heart," &c.

A demurrer having been filed, it was sustained by the court, and the indictment quashed.

The appeal is now made to us, was not this an erroneous decision?

There were three causes of demurrer urged.

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2. The nature or character of the assault is not sufficiently alleged. If this should be regarded as a proceeding at common law, and if we should upon that rest the sufficiency of the indictment, this objection would hold good, for there is a want of detail and certainty as to the facts and circumstances of the offence which could not be overlooked in a common law indictment. But this is a statutory proceeding, in which the indictment follows with substantial accuracy, the language of the act upon which it is framed. When an indictment is thus drawn, employing the very words of the law which defines the offence, its sufficiency cannot well be questioned. The cases cited by the prosecuting attorney, and indeed the prevailing tone of all authorities upon this question, recognize the correctness of the rule.

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Reversed.

State v. Morse.

Supreme Court of Iowa, 1848. 1 G. Greene 503.

An indictment having been held insufficient, the state appealed.

Opinion by Hastings, C. J. The omission in the indictment to charge, in the language of the statute, that the defendant

deposed, affirmed, or declared some matter to be fact, knowing the same to be false, or denied some matter to be fact, knowing the same to be true, is a substantial defect, and is not cured by any statute The statute referred to by the prosecuting attorney, providing that "no indictment shall be quashed if an indictable offense is clearly charged therein, or if the charge be so explicitly set forth that judgment can be rendered thereon," does not cure the defect for the reason that no indictable offense is set forth in the indictment according to statute.

Judgment affirmed.

State v. Corwin.

Supreme Court of Iowa, 1911. 151 Iowa 420, 131 N. W. 659.

The defendant appealed from a judgment of conviction of having practiced as a physician without having first obtained a license.

Ladd J. - The defendant was accused of having professed and actually undertaken to cure and heal without having obtained and caused to be recorded a certificate from the State Board of Medical Examiners; the indictment charging that he "did wilfully and unlawfully assume the duties of a physician, and make a practice of treating persons afflicted with diseases and did then and there willfully and unlawfully publicly profess to cure and heal persons afflicted with disease by a system of treatment called 'chiropractic.'" He moved that the indictment be set aside for that, among other things, it was defective, in that no more than a legal conclusion was pleaded therein and several offenses were joined in a single count.

I. Section 2579 of the Code defines who shall be deemed practicing medicine, surgery, or obstetrics or as a physician, and, as pointed out in State v. Heath, 125 Iowa, 585, these are divided into three classes: (1) All "who shall publicly profess to be a physician or surgeon or obstetrician and assume the duties;" (2) those "who shall make a practice of prescribing and furnishing medicine for the sick;" and (3) those "who publicly profess to cure or heal." Section 2580 of the Code imposes a penalty on any person who by his conduct brings himself within any of these classes. So that, construing the statutes together, they enumerate several acts disjunctively which may constitute the offense of practicing as a physician without a license, and the doctrine is well settled that "when several acts are enumerated disjunctively as constituting an offense, and are not repugnant to each other, they may be alleged conjuctively in an indictment without duplicity." State v. Hubbell, 137 Iowa, 570. The different acts which constitute the offense in one practicing without a license are not

necessarily inconsistent with each other, and the indictment, even if it had charged the acts of the defendant such as to bring him within all three classes, would not have been vulnerable to the criticism of charging more than one offense.

Nor was there error in ruling that the facts were pleaded with sufficient particularity. These were stated, in substance, in the language of the statute, and the rule prevails that when this so individuates the offense that the offender has proper notice from the statutory terms of the particular offense charged it is enough. State v. Porter, 105 Iowa, 677; State v. Bair, 92 Iowa, 28. See State v. Wilhite, 132 Iowa, 226. A specific detail of the particular things done was not essential to apprise the accused of the offense charged. It was sufficient for that purpose to allege the acts declared by the statute to constitute the offense.

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Affirmed.

State v. Stapp.

Supreme Court of Iowa, 1870. 29 Iowa 551.

Having been convicted of keeping a nuisance the defendant appealed.

Miller J. The indictment charges that the defendant, "at the county of Marion, and state of Iowa, on the 1st day of January, 1869, unlawfully did use a certain building then and there situate, and under the control of him, the said H. T. Stapp, for the purpose of keeping intoxicating liquor, to wit, rum, gin, brandy, whisky, wine and bitters therein, with intent to sell the same, and in said building, in said county and state, did unlawfully sell said liquors," etc., etc.

On the trial, the state called a witness who testified as follows: "Sometime in the month of February, 1869, I was in the defendant's grocery in the town of Columbia, Marion county, Iowa; some men came in and called for 'wine', and defendant set them out a bottle containing something that was red, and they took and drank of it; don't know whether they paid for it or not; it looked like wine and I believe it was wine." This was all the evidence given.

The jury retired under instructions from the court, not excepted to, and after being out a short time they sent in to the court this interrogatory: "Will the court please instruct: should the state prove that the wine was foreign, or must the defendant prove the wine was native?" To which the court answered,

instructing the jury that, "unless the circumstances of the sale as proved by the state develop the fact that it was native wine, then it is for the defendant to show, to avail himself of that defense, that it was native wine."

The giving of this instruction is the foundation of the errors assigned.

The act of January 22, 1855 (Rev. p. 259), prohibited the manufacture, sale, and keeping with intent to sell, "intoxicating liquors," except as permitted by that act. Rev. § 1559-1564. The description given by the act to the article, the sale etc. of which, is prohibited, is "intoxicating liquors."

To this act of 1855 there was passed, "an act supplementary and amendatory" thereto, January 28, 1857 (ch. 157 Laws of the Sixth General Assembly), the ninth section of which provides that, "Whenever the words 'intoxicating liquors' occur in this act, or the act to which this is amendatory, the same shall be construed to mean all spirituous, malt and vinous liquors; provided, that nothing in this act shall be construed to forbid the manufacture of cider from apples, or wine from grapes, currants, or other fruits grown or gathered by the manufacturer.

By the first section of chapter 143 Laws of the Seventh General Assembly, the above section was amended, so as to read: "Wherever the words intoxicating liquors occur in this act, or the act to which this is amendatory, the same shall be construed to mean all spirituous and vinous liquors; provided, that nothing in this act shall be so construed as to forbid the manufacture and sale of beer cider from apples, or wine from grapes, currants or other fruits grown in this state." Revision of 1860 § 1583.

This last provision is a substitute for the 9th section of the act of 1857, and is declaratory of what the words "intoxicating liquors," wherever they occur in that or the act of 1855, are intended to mean.

The words by the purview of the act, include "all spirituous and vinous liquors; then the proviso withdraws certain described vinous liquors from the operation of the act. The question, then, is, whether the state must prove that the liquors sold were not of the description withdrawn by the proviso.

A proviso in an act is generally intended to restrain the enacting clause, and to except something which would otherwise have been within it, or in some manner to modify the enacting clause. Wayman v. Southard, 11 Wheat. 1.

There is a clear distinction between a proviso and an exception. In the case of an exception in the purview of the act, it must be negatived in pleading, but a proviso need not, even though

it is found in the same section, if it be not referred to and ingrafted on the enacting clause. Sedg. on Stat. and Const. Law, 62, 63.

The rule as stated by Lord Mansfield, is, "what comes by way of proviso in a statute must be insisted on for the purpose of defensely by the party accused; but where exceptions are in the enacting part of the law, it must in the indictment charge that the offense is not within any of them." See Sedg. on Stat. and Const. Law, 63, and cases there cited.

If the language of the section was, that "wherever the words intoxicating liquors" occur, etc., the same shall be construed to mean all spirituous and vinous liquors, except cider from apples and wine from grapes, currants or other fruits grown in this state," then the exceptions under the rules of pleading would have to be negatived. But not so where the exceptions come by way of proviso.

It is never necessary to negative provisos, or even exceptions merely noticed in the purview of the act, as by saying "none shall do the act prohibited except the cases thereinafter mentioned," for here the exception is not contained in the clause defining the offense. Whart. Am. Cr. L. 3d ed. 190, 191; Reynolds v. State, 2 N. S. McCord, 365; State v. Baker, 18 Vt. 195; State v. Palmer, id. 570; State v. Williams, 20 Iowa, 98, and authorities cited in the opinion of Cole, J.; Colson v. The State, 7 Ind. 590.

It is only necessary to notice a proviso in pleading where it adds a qualification to the enacting clause, so as to bring a case within it, which, but for the proviso, would be without the statute; but it is not necessary to negative a proviso which withdraws a case from its operation, which, but for the proviso, would be within it. Whart. Am. Cr. L. 3d ed. 191.

The case under consideration is one where the proviso in the statute withdraws domestic wines from the operation of the enacting part of the law, and it is not necessary for the indictment to charge or the state to prove that the case does not come within the proviso. This is matter of defense. The judgment should be

Affirmed.

State v. Moon.

Supreme Court of Iowa, 1914. 167 Iowa 26, 148 N. W. 1001.

The defendant appealed from a judgment of conviction of murder in the second degree.

Weaver, J. - The theory of the state's case is that Rebecca Shade, a young unmarried woman, having become pregnant by one Morris the latter applied to the defendant, a practicing physician, for the purpose of having a miscarriage produced upon the young woman, and that defendant, for a stated compensation, undertook to bring about the desired result. In pursuance of said alleged arrangement, it is claimed that a criminal operation was performed upon the young woman by the defendant, from the effects of which death ensued. A conviction having been obtained and new trial denied, the defendant appeals, seeking a reversal of the judgment because of alleged errors occurring at the trial.

.....

I. Under the law of this state, a person who, in an unlawful attempt to produce a miscarriage, inflicts injury upon a woman, from which she dies, is guilty of murder in the second degree. State v. Moore, 25 Iowa, 128. The statute which makes such an operation unlawful excepts from its prohibition a miscarriage produced or attempted, where such act or operation is necessary to save the life of the woman upon whom the operation is had. Code, section 4759. To justify a conviction of murder in such cases, the indictment must charge, and the evidence must show, beyond a reasonable doubt, not only the alleged act or attempt to produce the miscarriage, but also that such act or attempt was not necessary to save the life of the woman. State v. Aiken, 109 Iowa, 645. The indictment in this case makes the necessary allegation both of the wrongful use of an instrument for the purpose of producing a miscarriage upon the person of Miss Shade, and that such miscarriage was not necessary to save her life. .....

For other reasons the judgment was - Reversed.

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State v. Cochran.

Supreme Court of Iowa, 1917. 179 Iowa, 1304. Sec. III

Having been convicted of carrying concealed weapons, the defendant appealed.

Stevens, J. - I. The indictment charged the defendant with the crime of being armed with or having a revolver concealed upon his person, which indictment, omitting the formal parts, is as follows:

"The said Ulysses Cochran, on or about the 25th day of July, A. D. 1915, in the county aforesaid, unlawfully and feloniously did go armed with and have concealed upon his person, without a lawful permit therefor, a certain dangerous weapon, to wit, a

revolver. ....."

The defendant demurred to the indictment, which demurrer was by the court overruled, and, upon trial, the defendant was convicted and sentenced as stated above.

The statute upon which this prosecution is based is Section 4775-1a of the Supplement to the Code, 1913, and, so far as material to the discussion of this question, is as follows:

"It shall be unlawful for any person, except as hereinafter provided, to go armed with and have concealed upon his person a dirk ..... or other offensive and dangerous weapons or instruments concealed upon his person; provided that no person under 14 years of age shall be allowed to carry firearms of any description."

Defendant contends that the indictment is fatally defective because it failed to allege that defendant was not a "wholesale dealer or jobber." The so-called exception, which it is claimed should have been negatived by the allegations of the indictment, is contained in Section 4775-12a, Code Supp., 1913, and is as follows:

"This act shall not affect in any respect wholesale dealers or jobbers."

Counsel assume that the effect of the latter section to the statute is to except the class designated therein wholly from the operation of Section 4775-1a, supra. This construction is not warranted, when the several sections of the statute relating to the subject of carrying and selling dangerous weapons are construed together. There could be no purpose on the part of the legislature in exempting wholesale dealers and jobbers from the statute prohibiting all other classes of citizens from being armed with or having concealed upon their person a dangerous weapon without first obtaining permission from some one of the officers authorized by law to grant same. The above statute not only prohibits all persons from being armed with and having concealed upon their person dangerous weapons, but Section 4775-9a prohibits dealers from "selling, keeping for sale ..... or [to] give away to any person ..... any revolver, pistol, or pocket billy or other weapons of a like character which can be concealed on the person," without first procuring a permit from an official having authority to issue same. The section following prescribes the duties of the holder of a permit to sell, and the penalty for the violation of the provisions of Section 4775-9a.

The evident purpose of the legislature, in enacting Section 4775-12a, was to exempt wholesale dealers and jobbers from the provision of the statute prohibiting the sale of dangerous weapons without having first procured a permit to sell the same, but not to exempt them from the operation of the statute prohibiting the

carrying of dangerous weapons. It is, therefore, clear that no exception was created by the statute which it was necessary for the State to negative in the indictment, and the demurrer was properly overruled.

.....

On another ground the judgment was Reversed.

State v. Burns.

Supreme Court of Iowa, 1917. 181 Iowa, 1098.

Having been convicted of carrying concealed weapons, the defendant appealed.

Gaynor, C. J. - .....

In this case, the defendant was charged, as shown by the indictment, with going armed, and having concealed upon his person an offensive and dangerous weapon, without having a permit to carry it. What are the essential elements of the crime? (1) That he be found carrying concealed upon his person an offensive and dangerous weapon; (2) that he did not have permission to do so.

Section 4775-1a, Code Supp., 1913, provides:

"It shall be unlawful for any person, except as hereinafter provided, to go armed with and have concealed upon his person ..... a revolver ..... or other offensive and dangerous weapons or instruments concealed upon his person."

It will be noted that in this statute the act inhibited is not made absolutely unlawful, because the very statute itself excepts conditions upon which it may be lawful. An indictment charging merely that one went armed with, and had concealed upon his person, an offensive and dangerous weapon, which does not state that the party charged does not come within the exception, leaves the mind in doubt as to his criminality. An indictment which charg the violation of a statute must so state the facts that, upon demurrer, the facts being admitted, an intelligent judgment could be pronounced by the court. If an indictment is drawn under a statute which, in itself, excepts some persons from criminality for the act, how can it be charged that the defendant is guilty unless it is alleged and proved that he is not within the exceptions of the statute? If proof fails on this, it leaves the mind in doubt as to whether there is criminality in the act.

The very statute which contains the inhibition against carrying concealed weapons, contains the exception to the inhibition, and, therefore, is a part of the same statute which creates the crime. It is true that the circumstances of the exception are found in subsequent statutes, but the exception itself is found in the statute which creates the crime. It is a rule of general recognition that an indictment which charges one with violation of a statute which has in itself exceptions and provisos, must negative the exceptions or provisos, in order to charge a punishable crime. See State v. Aiken, 109 Iowa 643. We have had occasion to pass upon this statute recently. See State v. Cochran, 179 Iowa 1304. In that case the court said:

"The State had the burden ..... of showing by the evidence beyond a reasonable doubt that the defendant did not at the time have a permit to go armed."

In the case before us, while there was evidence from which the jury might find that the defendant was carrying a concealed weapon, there was no evidence and no attempt to prove that the defendant did not come within the exception. Until there was proof that he was outside the protection of the exception, the State did not prove one of the essential elements of the offense. It is right for us to say that the attorneys appearing in this court did not try the case below.

For the reasons above suggested, the cause is -

Reversed and remanded.

(c) The Conclusion.

The rule of the common law was that "every indictment, except for mere nonfeazance, must conclude against the peace of the King, in whose reign the offense was committed" (1 Chit. Cr. Law 247). Hence if the offense was committed in one reign but the indictment was not presented until another, a conclusion generally "against the peace of our lord the King" would render the indictment defective, since it should conclude "against the peace of the late sovereign." In this country this took some such form as "against the peace and dignity of the United States," "against the peace and dignity of the state of Iowa", (State v. Stroud (1896) 99 Iowa 16) or simply "against the peace and dignity of the state." If the offense alleged to have been committed was statutory it was necessary to add a statement to that effect. "Formerly, it was necessary to set out at length the statute, or statutes, if more than one, upon which an indictment was founded, in order that the party might be informed of the law, against which it was alleged that he had offended. This particularity being attended with much inconvenience, and rendering the proceedings very cumbersome, the conclusion 'contra formam statute' or 'contra forman statuorum' if the indictment was founded upon more than one statute, was received as a sufficient compliance with the law, instead of the long recital. But as many prosecutions still failed, because of the conclusion, 'contra formam statuti' when it should have been 'statutorum', and

vice versa, the Courts permitted the device of concluding 'contra formam statut., and would construe the abbreviation to be statuti or statutorum, in order to fit the case." (State v. Smith (1869), 63 N. C. 234, 235). It was held in an early Iowa case that it was not necessary to set out the specific statute under which the indictment was found, and that it made no difference whether the statutory reference was worded in the singular or the plural (Zumhoff v. State (1854), 4 Greene 526).

The conclusion required no more than the statement "against the peace" etc. together with a reference to the statute upon which the charge was based, if it was a statutory offense. But other statements were frequently thrown in for good measure. Thus the conclusion might be: "To the great scandal, infamy, disgrace, and damage of the said A. B. to the evil and pernicious example of all others, in contempt of our said lord the King, and his laws" against the form of the statute in such case made and provided" and against the peace of our said lord the King, his crown and dignity." (2 Chit. Cr. Law 4).

The Iowa Code provides (5290) that "no indictment is insufficient, nor can the trial, judgment or other proceedings thereon be affected by reason of any of the following matters: ..... 2. For the omission of any of the following allegations, namely, 'With force and arms,' 'Contrary to the form of the statute, or of the statutes,' or 'Against the peace and dignity of the state'". More than this, the statutory form of indictment (5281) entirely omits the conclusion. In Iowa criminal procedure the conclusion is merely an interesting bit of history.

(d) Signatures and Indorsements.

The signatures commonly found upon an indictment are those of the prosecuting attorney and of the foreman of the grand jury. Neither of these seems to have been required by the common law, but the practice from the earliest times has been that the finding of the grand jury is signed by its foreman. The signature of the prosecution attorney commonly appears upon the indictment because the indictment is a bill of indictment found by the grand jury to be a true bill, and the bill of indictment is signed by the prosecuting officer. But at common law it formed no part of the indictment itself and in no way affected its validity.

In early times, after the grand jury had considered the evidence in support of a bill of indictment, they indorsed upon it the words "billa vera" if they found it a true bill, and "ignoramus" if they did not. Later these indorsements came to be written" "a true bill" and "not a true bill" or "not found". The common law considered that this "endorsement is parcel of the indictment, and

the perfection of it; ..... it is the life of it"(Rex v. Ford (1430), 80 English Reports (Reprint) 68, Yelverton 99, Cro. Jac. 151). There was no common law requirement that the names of the witnesses examined by the grand jury should be indorsed upon the indictment, but this is frequently called for by legislation. The same may be said of the indorsement "found at the instance of A. B." in prosecutions instigated by a private prosecutor.

The Code provides that "every indictment must be indorsed "a true bill" and the indorsement signed by the foreman of the grand jury" (Supp.'13, § 5274a), to which indorsement must be added" 'found at the instance of' (here state the name of the person)" if the indictment is found at the instance of a private prosecutor (5275. The court may tax the costs against such person if the prosecution fails, "if satisfied from all the circumstances that the prosecution was malicious or without probable cause"). Also, "the names of witnesses on whose evidence it is found must be indorsed thereon before it is presented in court" (5276). And the statutory form of indictment concludes "in the county aforesaid (here insert the act or omission constituting the offense).

County Attorney of _____County" (5281).

The indictment "must be, with the minutes of the evidence of such witnesses, presented to the court by the foreman in the presence of the grand jury, and all of the same marked 'filed' by the clerk (Compiled Code § 9339 see also §§ 9326 and 9380-3). The result of this is another indorsement. It was said in State v. Pelser (1917, 182 Iowa 1): "The original indictment bears the following endorsement:

'Presented in open court by the foreman of the grand jury in the presence of his fellows, and filed with the minutes of testimony attached, this 7th day of April 1915!"

Wau-kon-chaw-neek-law v. The United States.

Supreme Court of Iowa, 1844. Morris 332.

Per Curiam, Mason, Chief Justice .....

The fourth error assigned is that "The record does not show that the indictment was indorsed by the foreman as a true bill." The record states that the grand jury returned this bill into court (among others) as a true bill, but the indorsement required by the statute is entirely wanting, so far as appears from the transcript. Under these circumstances, should the omission be deemed a fatal defect? The law requiring the words "a true bill," with the foreman's name subscribed thereto, to be indorsed upon

a bill of indictment, is merely directory. This is doubtless intended as the appropriate evidence of the same having been regularly found. But where there is other proof that the grand jury duly returned the bill into court as "a true bill", we think that furnishes sufficient prima facie evidence of regularity in this respect to prevent an omission of the required indorsement from becoming a fatal defect at this stage of the proceedings.

In fact there is a consideration connected with this idea whic applies to this as well as to many other of the objections raised in this case. The object of a bill of indictment is merely to put the party accused upon his trial.

Our law watches over the rights of the citizen with so much care that it will not even allow him to be put to the trouble, vexation, and expense incident to a defense in court, until a majority of twenty-three good and lawful men, upon their oaths, have declared him guilty. If there be error or irregularity in the finding of the indictment, he ought not to be made to enter upon his defense.

But after the proper time has passed for making this objection; after he has so far admitted the sufficiency of the indictment as to consent to go to trial, especially after the unanimous verdict of a petit jury pronouncing him guilty, it would seem rather late to question the regularity of the proceedings by which he was put upon his trial. The result furnishes strong evidence that he ought to have been tried.

Where there has been a substantial error in such proceedings, it would doubtless be in accordance with established authorities to reverse the case on that account. We should not have felt justified in deviating from such a rule. But where there is a mere irregularity in the form of the proceedings, a simple deviation from some directory rule, the reasoning above stated seems to us so just and forcible that we should not feel disposed to be governed even by stronger authority than the only one cited on this point by the counsel for the plaintiffs in error (5 Greenleaf, 432).

.....

Affirmed.

State v. Lightfoot.

Supreme Court of Iowa, 1899. 107 Iowa 344, 78 N. W. 41

The defendant appealed from a conviction of the crime of exposing a poisonous substance, with intent that it should be taken by a horse.

Beemer, J. - .....

I. In March, 1896, an information charging the defendant with the offense of which he was convicted was filed with W. G. Busier, a justice of the peace. The defendant was arrested by virtue of a warrant issued on the information, and brought before the justice, and, waiving examination, he gave bail for his appearance before the district court. When the grand jury which acted upon the information and returned the indictment was impaneled, Busier was appointed foreman. He was challenged by the defendant on the ground that he was the magistrate before whom the preliminary hearing was had. The challenge was sustained, and Busier was directed by the court not to take any part in the proceedings when the charge against the defendant was being investigated. The indorsement "A true bill" on the indictment was returned, signed by Busier as Foreman, and the defendant moved to set it aside for that among other reasons. The motion was overruled, and of that ruling the defendant complains. Section 4291 of the Code of 1873, as amended by Chapter 42 of the Acts of the Twenty-first General Assembly, is as follows: "An indictment cannot be found without the concurrence of four grand jurors, when the grand jury is composed of five members; and not without the concurrence of five grand jurors when the grand jury is composed of seven members. Every indictment must be indorsed 'A true bill,' and the indorsement must be signed by the foreman of the grand jury." It was thus made the duty of the foreman of the grand jury to sign the indorsement required, although he might not have approved the indictment; and the fact that Busier signed the indorsement in question does not show that he concurred in the indictment, nor that he took any part in the proceedings which resulted in the indictment. Whether it would have been presumed that he did take part in such proceedings, had he not been directed to refrain from so doing, we have no occasion to determine. It must be presumed, in the absence of a showing to the contrary, that he obeyed the direction of the court; and the fact that he performed a statutory duty in signing the indorsement, after the investigation had been completed and the action to be taken determined does not overcome that presumption.

(On other grounds the judgment was) - Reversed.

Ray v. State.

Supreme Court of Iowa, 1848. 1 G. Greene 316.

Opinion by Kinney J. - Ray and Burge were jointly indicted for larceny, at the March term, 1848, in Henry county. Ray pleaded "not guilty", and demurred to the indictment, which was overruled. He obtained a separate trial; and at the same term of the court was tried and convicted, and sentenced to imprisonment, in the penitentiary, for three years. The defendant then sued out a writ

of error to this court, procured a supersedeas to stay the judgment of this court below, and the case appears before us upon three bills of exceptions taken on the trial, embodying all the evidence, with the instructions of the court, which form the basis of the following assignment of errors:

1. The court below erred in overruling the demurrer of the defendant below to the said counts in the indictment.

2. The court below erred in admitting the evidence of Eurding to go to the jury, after he had proved himself to have been the principal felon.

3. The court erred in deciding that the witness, Eliza Tagg, should not answer the question, whether there was not a marriage contract between her and witness, Eurding, as set forth in said exceptions.

4. The court erred in instructing the jury that it was their privilege to convict the defendant on the uncorroborated evidence of witness, Eurding; and that the instructions contained in the bill of exceptions were not in accordance with law.

5. The court erred in leaving a discretion to the jury, in receiving or rejecting the uncorroborated evidence of Eurding.

6. The court erred in overruling the defendant's motion in arrest of judgment, and for a new trial.

As a majority of the court are of opinion that the indictment was substantially correct, under our statutes, and consequently the demurrer properly overruled, we will confine our examination to the other errors assigned, constituting, as they do, the most important features of the case, and upon which the court have no difficulty in coming to a unanimous conclusion.

We will, however, as preliminary to the consideration of the main questions presented by the assignment of errors, notice the point made by counsel, that the court should have granted a new trial, because the name of Eurding was not endorsed on the indictment.

The statute makes it the duty of the grand jury, in all cases where a true bill is returned into court, to note thereon the name or names of the witnesses upon whose evidence the same was found. Rev. Stat. p. 297, ¶ 3.

We think a compliance with this provision of the statute ought in all instances to be regarded.

To protect the innocent, and punish the guilty, are the two great objects to be kept in view in the administration of criminal

jurisprudence. While, upon the one hand, the law will hold the offender to a strict accountability, it should upon the other, extend to the accused all possible facilities for a fair, full, and impartial trial. And as the accused is always presumed innocent until convicted, no course should be adopted that would deprive him of that fair trial so humanely secured to him by law.

The names of the witnesses upon the indictment will inform him of the authors of the prosecution, and thus enable him to prepare for his defense. For his benefit, the crime charged in the indictment is required to be clearly and distinctly stated, that he may know with certainty the nature and character of the offense; and that he may not be taken by surprise on the trial, it is quite as necessary that he should know who the witnesses are by whom it is expected the indictment is to be sustained. Hence the necessity of an observance by the grand jury of this plain and salutary provision of the statute.

In this case, however, it does not appear that any objections were made to Eurding testifying, in consequence of his name not having been endorsed on the back of the indictment. If the defendant had objected, and the objection been overruled, it should have been entered in the bill of exceptions, and might have then been good cause of error. But after his testimony had gone to the jury without objection, it is not on that account sufficient cause to authorize the court in granting a new trial. McKinny v. The People, 2 Gil., 552.

(On other grounds the judgment was) - Reversed.

State v. Story.

Supreme Court of Iowa, 1888. 76 Iowa 262, 41 N. W. 12.

The defendant appealed from a conviction of maintaining a liquor nuisance.

Rothrock, J. - I. The defendant was indicted by the name of M. Story. When he was arraigned he stated that his true name was Joseph Story, and, under the statute, the cause was afterwards prosecuted against him in his true name. He was jointly indicted with one J. Story. A verdict of guilty was found against both of the parties charged. A motion for a new trial was sustained as to J. Story. No further consideration need therefore be given as to the trial of the case against him. One G. B. Hamilton was called as a witness in behalf of the state. The defendant objected to the witness on the ground that his name was not indorsed on the indictment. The objection was overruled. The facts appear to be that the witness was examined before the grand jury, and proper minutes

made of his testimony, and he signed his true name to the minutes. But his name was indorsed on the indictment as J. B. Hamilton. Section 4293 of the Code requires the name of the witness to be indorsed on the indictment. But by section 4421, the attorney for the state may introduce any witness who was examined before the grand jury, and the minutes of whose testimony were taken by clerk of the grand jury, and presented with the indictment. An objection that the name of the witness is not indorsed on the indictment may be the ground of a motion to set aside the indictment, but is no reason for excluding the evidence. State v. Flynn, 42 Iowa, 164; State v. Fowler, 52 Iowa, 103. The ruling of the court was correct.

II. It is claimed that the evidence was insufficient to authorize a verdict against the appellant. We think otherwise. And we discover no error in the instructions to the jury; nor in refusing to give thos requested by the defendant.

Affirmed.

State v. Miller

Supreme Court of Iowa, 1895. 95 Iowa 368, 64 N. W. 288.

The defendant appealed from a conviction of the crime of seduction.

Robinson, J. - The indictment on which the defendant was tried was marked "A true bill," signed by the foreman of the grand jury, and duly filed. Accompanying it were minutes of the testimony of five witnesses who were examined before the grand jury. The defendant was arraigned, and pleaded not guilty. That plea was afterwards withdrawn, and a motion was filed by the defendant to set aside the indictment upon grounds stated as follows: "(1) The names of all the witnesses who gave material evidence in this case before the grand jury are not indorsed on the indictment as required by law, as shown by the attached affidavit. (2) The minutes of the evidence of all the witnesses who gave material evidence in this case before the grand jury are not attached to the indictment, nor returned therewith, nor filed in the office of the clerk of the district court, nor returned thereto, as required by law, as will fully appear by the indictment and the annexed affidavit. (3) The clerk of the grand jury by whom the indictment was found was a regular practicing attorney of this court, and while acting as said clerk, and taking the evidence in this case, told and advised the grand jury, of which he was not a member, that they had sufficient evidence to warrant finding an indictment against the defendant, and that the grand jury acted upon and under said advice in finding the same, and he also said that

the prosecuting witness was sufficiently corroborated to warrant the finding of an indictment." With the motion was filed the affidavit of a member of the grand jury which returned the indictment, and an admission in writing by the county attorney. The affidavit stated that each of three witnesses, who were named, testified before the grand jury, and gave material evidence, and that the evidence thus given was considered by the grand jury; that th clerk of the grand jury was a practicing attorney, and a member o: the bar of Wapello county; that he conducted the examination of witnesses in part, consulted the private attorney of the prosecuting witness, and advised the grand jury that they had corroborating evidence sufficient to warrant the finding of an indictment. The admission of the county attorney was to the effect that the three witnesses named gave material testimony before the grand jury, none of which was returned with the indictment. Counter affidavits were filed by the state, and additional affidavits were filed by the defendant.

It is a fact not disputed that none of the names of the three witnesses in question were indorsed on the indictment, and that no minutes of their testimony were returned with it. The affidavits show that the clerk of the grand jury was a practicing attorney, that he took part to some extent in examining witnesses, and that he had an unfriendly feeling for the defendant. There is much conflict in the affidavits, and we are of the opinion that, if they were competent evidence, the district court was authorized to find that the clerk did not take any part in the deliberations of the grand jury, and did not advise them as to the sufficiency of the evidence to authorize an indictment; that he consulted the private attorney of the prosecutrix, but only to ascertain if all the witnesses had been examined; that the part he took in the examination was by request of the foreman, and each member of the grand jury asked such questions of the witnesses as he wished to ask. The motion to set aside the indictment was overruled, and the defendant, after excepting to the ruling, renewed his plea of not guilty. There was a trial by jury, a verdict of guilty as charged a motion in arrest of judgment, and one for a new trial, which was overruled, and judgment was rendered as stated.

The appellant contends that the district court erred in not sustaining the motion to set aside the indictment. Section 4293 of the Code, as amended by chapter 130 of the Acts of the Eighteer General Assembly, provides as follows: "When an indictment is foun the names of all witnesses on whose evidence it is found must be indorsed thereon before it is presented to the court, and the minutes of the evidence of such witnesses must be presented with the indictment to the court and filed by the clerk of the court, a remain in his office as a record. ....." Section 4337 of the Code contains the following: "The motion to set aside the indictment can be made by the defendant on one or more of the following grounds, and must be sustained: ..... (2) When the names of all the witnesses examined before the grand jury are not indorsed

thereon; when the minutes of the evidence of the witnesses examin before the grand jury are not returned therewith. .....(4) ..... When any person other than the grand jurors was present before the grand jury during the investigation of the charge except as required or permitted by law." "4338. A motion to set aside the indictment on the ground that the names of all the witnesses examined before the grand jury are not indorsed thereon, or that the name of any other witness than those so examined is indorsed thereon as provided in the second subdivision of section four thousand, three hundred and thirty-seven hereof, shall not be sustained if the indorsement is corrected by the insertion or striking out of such names or name by the county attorney or clerk of the court, under the direction of the court so as to correspond with the minutes required to be kept by the clerk of the grand jury and returned and preserved with the indictment to the court". These provisions of the Code, so far as they relate to the same matter, must be construed together, and, so far as possible, effect be given to all. Section 4337 in terms requires that if the names of all the witnesses examined before the grand jury are not indorsed on the indictment it shall for that reason be set aside on motion. But the following section provides that a motion of that character shall not be sustained if the indorsement is corrected to correspond with the minutes of the evidence required to be returned and preserved with the indictment. Section 4647 of the Revision of 1860 requires that "when an indictment is found, the names of all the witnesses examined before the grand jury must be indorsed thereon, before it is presented to the court, and the minutes of the evidence of each witness examined before the grand jury taken by the clerk of the grand jury must be presented with the indictment to the court, and filed by the clerk of the court. ....." It was held in State v. Little, 42 Iowa, 51, that this provision did not require the indorsement of the names of persons who gave no evidence touching the matter under investigation by the grand jury, but only that the names of witnesses who gave evidence in regard to the matter investigated should be indorsed on the indictment. It will be observed that section 4293 of the Code, which corresponds with section 4647 of the Revision of 1860, is less broad in terms than the latter, and only requires that there be indorsed on the indictment "the names of all witnesses on whose evidence it is found." Therefore it is not necessary to indorse on the indictment the names of witnesses whose evidence did not in any respect contribute to the finding of the indictment. Although the affidavits for the defendant tend to show that the testimony given by the witnesses in question was material, they do not show that it formed any part of the evidence upon which the indictment was found. But, had that been the fact, it could not have been shown in the manner attempted. That affidavits are competent to show some things which transpire in the jury room is undoubtedly true. Section 2913 of the Code provides that "testimony to sustain or resist a motion may be in the form of affidavits." This relates to practice in civil cases; but section 4556 of the

Code, as amended, provides that "the rules of evidence prescribed in the civil part of this Code shall apply to criminal proceedings as far as applicable, and as they are not inconsistent with this chapter." These provisions authorize the practice, common in criminal cases, of showing occurences in the jury room by affidavits, and it was competent under them to show by that means the part which the clerk of the grand jury took in the examinati: of witnesses. But it was held in State v. Little, supra, that t: minutes of the evidence returned with the indictment and duly filed are made the test and standard by which to determine whether the names of all the witnesses examined before the grand jury are indorsed on the indictment, and that the affidavits by grand jurors or other witnesses cannot be received, as the record made by the filing of the minutes of the evidence returned with the indictment is conclusive.

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Affirmed.

State v. Ruby.

Supreme Court of Iowa, 1883. 61 Iowa 86, 15 N. W. 848.

From a conviction of the crime of burglary the defendant appealed.

Beck, J. - .....

II. The indictment was not signed by the district attorney, and for this reason it is claimed by counsel to be bad. There is no requirement of the statute that the indictment shall be signed by the district attorney, further than that the form prescribed by Code, section 4297, shows the signature of that officer. But this section is not a positive requirement that indictments shall follow the precise form prescribed. It provides that they shall follow it "substantially," that is, the substance of the indictments shall be the same as that pointed out in the form. The substance pertains to the allegations, not to the signature. The indictment before us, therefore, does not fail to conform in substance to the requirements of the statute, and cannot be assailed by demurrer. Code, () 4297, 4305, 4352. Nor is the defect a ground for a motion for arrest. Section 4491. We conclude that counsels' objections to the indictment are not well taken.

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(On other grounds the judgment was) - Reversed.

State v. Briggs.

Supreme Court of Iowa, 1886. 68 Iowa 416, 27 N. W. 358.

The defendant appealed from a conviction of the crime of adultery.

Reed J. - .....

II. Another ground of the demurrer was that it did not appear by any averment of the indictment, or by any indorsement thereon, that it was found at the instance of a private prosecutor. Section 4008 of the Code contains the following provision: "No prosecution for adultery can be commenced but on the complaint of the husband or wife." Another provision contained in section 4292 requires the grand jury, when an indictment is found at the instance of a private prosecutor, to state in an indorsement thereon the fact that it was found at the instance of such prosecutor. The position of the counsel is that, as the prosecution can be commenced only on the complaint of the husband or wife, such husband or wife is necessarily a private prosecutor, and, consequently, that the failure to indorse upon the indictment the fact that it was found at the instance of such prosecutor is fatal to the indictment. This position is not sound. The prosecution may be commenced either by making the complaint before the grand jury or by filing a preliminary information before a magistrate. When it is commenced by filing an information before a magistrate, it is not essential that the husband or wife should appear further in the case to prosecute it. State v. Baldy, 17 Iowa, 39; Same v. Roth, Id., 336.

It is averred in the indictment that the wife of the defend did commence the prosecution against him in that manner, and that he was held to answer the charges preferred against him by her. This averment fully meets the requirements of section 4008. The indorsement required by 4292 is not essential to the validity of the indictment. The requirement is merely directory, and the indorsement is required to be made to enable the court to tax the costs against the prosecutor, if it should be satisfied that the prosecution was malicious or without probable cause.

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Affirmed.

Joinder of Offenses.

(a) Duplicity.

Two mistakes which must be avoided in the indictment are duplicity and misjoinder of courts. "The indictment must charge but one offense, but it may be charged in different forms to meet the testimony, and if it may have been committed in different modes and by different means, may allege the modes and means in the alternative. Except in case of compound offenses, where in the same transaction more than one offense has been committed, the indictment may charge the several offenses and the defendant may be convicted of any offense included therein" (5284). Although the word is sometimes incorrectly used to mean misjoinder of counts (State v. Von Kutzleben (1907) 136 Iowa 89, 96, 113 N. W. 484), duplicity means the charging of more than one offense in a single count.

Indictment charges that D maintained a nuisance by keeping a building where the sale of liquor and gambling took place. Held:- Convicted. This was not a duplicity. Keeping a nuisance is the crime charged + remainder relates to the particular circumstances of crime charged

State v. Dean and Nealy.

Supreme Court of Iowa, 1876. 44 Iowa 648.

The state appealed from a judgment discharging the defendants after a demurrer had been sustained to the following indictment: "The grand jury of the county of Clarke, in the name and by the authority of the State of Iowa, accuse Dick Dean and John Nealy of the crime of keeping a nuisance, committed as follows: The said Dick Dean and John Nealy, on the 14th day of January, in the year of our Lord 1875, in the county aforesaid, did unlawfully keep, own, control, continue, establish and manage a building for the purpose and intent of keeping and selling therein, in the State of Iowa, intoxicating liquors in violation of law, and at said time and place, and in said building, the said defendants did keep and sell, in the State of Iowa, intoxicating liquors in violation of law: and at said time and place, and in said building, the said defendant did allow and permit gambling, fighting, drunkenness and breaches of the peace; and the same were carried on by and with the consent of the defendants, contrary to the statute in such cases."

Day, J. - We think the court erred in sustaining the demurrer. The defendants are accused of the crime of keeping a nuisance. This is the offense charged, and as to that the indictment is direct and certain as required by section 4298. What follows relates to the particular circumstances of the offense charged. The defendants committed the crime of nuisance by continuing and controlling a building for the purpose of selling intoxicating liquors therein in violation of law, and by selling in said

Jno. Butterfield Esquire

P. D. Q.:-

Payable.

Answered.

Searched.

building intoxicating liquors in violation of law, and permitting gambling, fighting, drunkenness, and breaches of the peace therein contrary to law. Any one of these acts may constitute a nuisance; but the three, taken together, can do no more. It is as though a party should inflict a mortal wound with a pistol, and then anothe with a knife, and then should strangle his victim to death.

Section 4091 of the Code provides that gambling houses, or houses where drunkenness, gambling, fighting or breaches of the peace are carried on or permitted, to the disturbance of others, are nuisances. Section 4092 of the Code provides that whoever is convicted of continuing a public nuisance as described in this chapter, shall be punished by a fine not exceeding one thousand dollars.

The prohibitory liquor law, section 1543, provides that whoever shall erect, establish, continue or use any building for any of the purposes prohibited in certain sections referred to shall be deemed guilty of a nuisance, and may be prosecuted and punished accordingly in the manner provided by law. It has been held that this refers to section 4092, which is the same as sectio 4412 of the Revision. State v. McGrew, 11 Iowa, 112. The nuisance, therefore, whether committed by keeping a house for the unlawful sale of intoxicating liquors, or by keeping a house where drunkenness, quarreling, fighting etc. are carried on or permitted, is punished in the same manner and under the same section.

Suppose a defendant should be convicted of a nuisance because at a particular time he controlled a certain building for the purpose of selling therein intoxicating liquors in violation of law: could he afterward be made amenable to the law for keeping a nuisance at the same time, in the same building, by permitting drunkenness, quarreling, etc? It seems to us he could not. And yet he could, if the two acts constitute wholly separate and distinct offenses. For a conviction of one offense could not be pleaded in bar of a prosecution for an entirely different and dis tinct offense.

It is true the indictment does not charge that the quarreling drunkenness, etc., were carried on or permitted to the disturbanc of others. The failure to employ the italicised words constitutes a failure to charge a nuisance committed in the particular manner referred to in section 4091. But this does not render the indictment vulnerable to a demurrer on the ground of duplicity. It is quite apparent that it was not the purpose of the indictment to charge the distinct offense of keeping a house resorted to for the purpose of gambling, as prohibited in section 4026.

Reversed.

D did steal & carry away certain goods.

Held:- affirmed - allegation that D did steal is surplusage.

State v. Hayden.

Supreme Court of Iowa, 1876. 45 Iowa 11.

The defendant appealed from a judgment of conviction under an indictment which charged that "the said James Hayden, on or about the 10th day of March, 1875, at or about the hour of one o'clock in the night of the same day, with force and arms in the county aforesaid, one store building of Beckman Bros. there situated, wherein valuable merchandise was kept for sale and store, viz: pocket knives, razors and revolvers, of the value of $100, feloniously and burglariously did break and enter into, with felonious intent, the goods and chattels of the said Beckman Bros. in the said store then and there being found, then and there feloniously and burglariously to steal, take, and carry away, and seven dozen of pocket knives, three razors and two revolvers of the goods and chattels of the said Beckman Bros., and of the value of seventy dollars, in the said store building, and then and there feloniously, and burglariously did steal, take and carry away, contrary to the form of the statute in such case made and provided."

Rothrock, J. .....

III. There was a motion in arrest of judgment, on the ground that the indictment charges the defendant with the commission of two offenses. An examination of the indictment will show that it contains all the necessary allegations to constitute the crime of breaking and entering a store building with intent to commit a public offense. Code, Sec. 3894. After alleging the intent to steal certain property, it is alleged that the defendant did steal, take and carry away certain goods, describing them.

The crime is designated in the indictment as burglary, and not as burglary and larceny. Whilst it is true that at common law, and under our Code, the felonious breaking of a store house is not technically burglary, yet the elements of the crime charged are the same as burglary, with the exception of the character of the building, and it must be assumed that the crime named in the indictment had reference to that of breaking and entering the store.

It is true that under the Code the indictment must charge but one offense, but it may be charged in different forms or counts to meet the testimony. Sec. 4300. Taking this whole indictment together, we do not believe it charges two offenses. The allegation that the defendant actually committed the crime of stealing the goods must rather be regarded as surplusage. It was a most important fact to show, as bearing upon the guilty intent with which the breaking and entering was done, and we regard it as no more than an allegation of evidence which may properly be rejected. It will be remembered that it was not claimed in the court below that the defendant was charged with larceny. The instructions of the court, the verdict of the jury, and the judgment, show that the crime for which the defendant was charged and tried was not larceny, but the breaking and entering the store with intent to commit larceny.

It never was permissible at common law to join two offenses in one count of an indictment, whatever the rule was as to allowing different offenses to be pleaded in separate counts, and yet it has been held that indictments for burglary substantially in the form of that under consideration were not bad for duplicity.

Com. v. Tuck, 20 Pick., 356; State v. Brady, 14 Vermont, 359; Josslyn v. Com., 6 Metcalf, 236. In the last named case it is held that if the breaking and stealing are charged in one count, only one offense is charged, and the defendant on conviction can be sentenced to one penalty only.

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Appeals from conviction on ground that two offenses are charged. 1. Burning bldg from which goods had been removed to defraud insurance Co. 2. a conspiracy to make a fraudulent sale of the goods. Held:- Ans 1 - There were two distinct offenses charged here Affirmed.

State v. Kennedy.

Supreme Court of Iowa, 1884. 63 Iowa 197. 18 N. W. 885.

The defendant, having been tried separately under an indictment in which he was charged jointly with four others, appealed.

Reed, J. - The indictment is in two counts. In the first count it is charged that the defendants agreed that goods and merchandise should be purchased on credit in the name of James A. Redfield & Co., which firm was composed of two of their number, to-wit, James A. Redfield and A. A. Kennedy, Jr.; that said goods and merchandise should be placed in the storeroom or building in Oxford, Iowa, occupied by said firm; that the property should then be insured; that the goods should then be removed from said building stealthily and secretly, and placed in rooms of buildings occupied by the defendant, A. A. Kennedy, Sr., and R. C. Lyman; that the building occupied by Redfield & Co. should then be burned; and that they should then make the claim to the insurers that the goods remained in the building at the time of the fire, and were consumed with the building, and by means of the false pretense obtain from the insurers the amount of the insurance.

In the second count, it is charged that the parties conspired together to commit the same felony; that is, to obtain money from the insurers of the property by the false pretense that it had been burned and consumed in the building; and it is charged that their agreement was to accomplish this fraud in substantially the same manner charged in the first count; and in addition to this it is charged that they conspired to make a disposition of the goods for the purpose of defrauding the creditors of Redfield & Co. It is charged that this purpose of the conspiracy was to be accomplished in the following manner; Each of the defendants, it is alleged,

was a member of the firm of Redfield & Co., but their agreement was that it should be represented that the firm was composed only of Redfield and Kennedy, Jr.; that its business should in the beginning be so conducted as that the credit of the firm should be well established; that, after this was accomplished, large quantities of goods should be purchased on credit in the name of the firm, and placed in the storeroom or building in which it carried on business; that they should then be insured; after which they should be secretly and stealthily removed from the building, and placed in possession of the defendants, Kennedy, Sr., Lyman and Brown; that the storeroom of Redfield & Co. should then be burned, and the claim should then be made to the insurers that the goods had been consumed with the building, and to the creditors of Redfield & Co. that such goods as might be found in possession of Kennedy, Sr., Lyman and Brown, had been sold to them in good faith and for a valuable consideration.

It is alleged in each count that, in pursuance of the conspiracy, goods of the value of more than $10,000 were purchased on credit in the name of James A. Redfield & Co., and placed in the storeroom in which that firm did business; that insurance was then obtained on them to the amount of $3,400, in the Springfield Fire Insurance Company, of Springfield, Mass., and $4500 in the German American Insurance Company, of New York City; that the parties then proceeded to remove such goods stealthily and secretly from the building, until not more than $1,500 worth remained; that they then set fire to and burned the building; and that $500 worth of the goods were burned and consumed with it; that they then made the claim to the insurance that the whole amount of said goods were in the store, and were burned, and sought to collect from them the whole amount of the insurance. And in the second count it is alleged that, to the creditors of whom the goods were purchased, they pretended that such goods as were found in the possession of Kennedy, Sr., Lyman and Brown had been sold to them in good faith and for a valuable consideration.

The defendants demurred to the indictment on the ground that it charged more than one offense. The overruling of this demurrer is assigned as error. In the argument of this assignment, counsel for defendant have urged the following grounds, on which they claim that the indictment is bad for duplicity, viz.: First, that each count in the indictment charges an offense distinct from that charged in the other count; Second, that two conspiracies are charged, viz., a conspiracy to obtain money from the insurers of the goods by false pretenses, and a conspiracy to make a fraudulent sale or transfer of goods; and Third, that the indictment charges the crime of burning insured property with intent to injure the insurers thereof, as well as the crime of conspiracy. We will consider these grounds in the order in which they are here stated.

I. It is averred in the charging part of the second count "that the defendants committed the said crime as aforesaid in the manner following;" and this language is followed by a statement of the acts constituting the offense as charged in that count. This language clearly refers to the particular conspiracy which is

charged in the first count, and not to the crime of conspiracy generally. It means that the statement of the offense contained in that count is but a statement in a different form of the facts constituting the offense charged in the preceding count, and this is allowable under section 4300 of the Code.

II. The crime of conspiracy consists in the unlawful and corrupt agreement of the parties. It is entirely distinct from the crimes or unlawful acts which the parties have in view when they enter into the conspiracy, or the object which they intend to accomplish in pursuance of it. The crime is complete whenever the agreement is entered into, and it is not essential to it that any overt act be committed in pursuance of it. Hence, the parties who enter into a conspiracy are, by that act, guilty of but one offense, whether their agreement is to commit one crime or many crimes. 2 Bishop on Criminal Law, § 192; The State v. Sterling, 34 Iowa, 443. The indictment before us, while it alleges that the parties conspired to commit more than one crime, charges but one conspiracy.

III. It is charged in both counts of the indictment that the defendants, in pursuance of the conspiracy, purchased the goods and merchandise and placed them in the building; that they then procured the insurance companies named to insure them against loss and damage by fire; and that, while a portion of the goods remained in the building, they willfully set fire to and burned it, and that a portion of said goods were consumed in said fire, and that this was done with the purpose of asserting a claim that all of the goods insured were burned, and of obtaining from the insurers, by means of this pretense, the amount of the insurance. These allegations are all distinct from the charge of conspiracy. They are set out in the indictment, following the statement of the acts constituting the crime of conspiracy. They are not essential to the charge of conspiracy, but every element of the crime of burning property which is insured against loss or damage by fire, with intent to injure the insurers, as defined in section 3889 of the Code, is included in them.

The defendants are as certainly accused of that crime as they are of conspiracy. In the case of the State v. Hayden, 45 Iowa, 11, and The State v. Shaffer, 59 Iowa 290, we held that the indictments which, in the same count charged the breaking and entering a building with intent to steal and the actual stealing of property within the building were not double. The ground of this holding is, that the allegation of the larceny within the building is but the equivalent of the allegation that the breaking and entering was with the intent to commit that crime, and that, therefore, but the one crime was charged. But we think the indictment in this case cannot be brought within the principle of that holding. The allegations in question occur in the indictment, after the facts which constitute the crime of conspiracy have been fully alleged. They do not purport to relate to the conspiracy, but charge distinctly that

the acts were committed after the conspiracy had been fully entered into, and in pursuance of it, and the offense charged by the allegations is entirely distinct from any of the offenses which it is alleged, in the part of the indictment charging the conspiracy, was the object of the conspiracy. On this ground, then, we think the demurrer ought to have been sustained. Section 4300 of the Code expressly provides that the indictment shall charge but one offense.

Many other questions are presented by the record, but as, under this ruling, the case cannot be again tried on this indictment, we think it unnecessary to determine them.

Reversed.

State v. Heft.

Supreme Court of Iowa, 1910. 148 Iowa 617, 127 N. W. 830.

From a judgment of conviction of rape, the defendant appealed.

Evans, J. .....

II. The defendant was tried under the following indictment: "The grand jury of the county of Buchanan, in the name and by the authority of the state of Iowa, accuses John Heft of the crime of rape committed as follows: The said John Heft on or about the 15th day of November, in the year of our Lord one thousand nine hundred and eight, in the county aforesaid, did in and upon one Clara Heft, then and there being a female child under the age of fifteen years, unlawfully, willfully, and feloniously make an assault, and did then and there carnally know and abuse said Clara Heft, contrary to and in violation of law." The defendant demurred to the same as being bad for duplicity, in that it charged two offenses. Appellant's argument is that the indictment charges the crime of rape upon a child under fifteen years of age, and that it also charges assault. It is argued that assault is not a necessary element of the crime of rape upon a child under fifteen years of age. Granting for the sake of argument that such crime may be committed without an assault, it does not follow that it is necessarily committed in that way. The crime may be committed upon a child under age whether she consent or refuse. If she consent, the law will not deem it a consent. And if she actually refuse and resist, she only does in fact what she is presumed to do in law, and in a legal sense the offense is the same in either case. If rape should be committed by actual force upon a resisting female under age, would necessarily involve an actual assault. The indictment, therefore, charges but one offense, and it is not bad for duplicity. State v. Casford, 76 Iowa, 330; State v. Peterson, 110 Iowa, 647.

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On other grounds the case was - Reversed.

(b) Joinder of Counts.

The early English law accorded to persons indicted for misdemeanors certain rights and privileges which were denied to those indicted for felonies. This necessarily presented a bar to the joinder of a count for a felony with a court for a misdemeanor. But any number of misdemeanors could be joined in the same indictment and the defendant could be convicted on all counts of which he was found guilty. Different counts charging felonies could also be joined subject to certain restrictions. Unless they merely charged the same offense in different ways in order to meet the evidence, it was necessary that the offenses should be of the same nature and the mode of trial the same, and that it should be the same transaction which was charged in the several counts. There was no such thing as a conviction of more than one felony under the same indictment, although this has been permitted in a few of our states.

The Code changes these rules of the common law in many respects. The general rule is that but one offense must be charged (5284). This applies to misdemeanors as well as to felonies, except that it is expressly provided that counts may be joined in indictments or informations charging several offenses under the Chapter on Intoxicating Liquors (2425). The exception "in case of compound offenses, where in the same transaction more than one offense has been committed," allows the indictment to "charge the several offenses" and provides that "the defendant may be convicted of any offense included therein". This permits counts for felonies to be joined with counts for misdemeanors, which is also true of the provision which permits the offense to be charged in different forms to meet the evidence.

State v. McPherson.

Supreme Court of Iowa, 1859. 9 Iowa 53.

Having been convicted on one of the four counts of an indictment against him, the defendant appealed.

Wright, C. J. - The indictment when presented by the Grand Jury, contained four counts: The first was for counterfeiting silver coin, current by law within this State; the second, for, having in possession at the same time, five pieces of false coin, knowing the same to be false, with intent to utter and pass as

true; third, for having less than five pieces of such coin, with the same intent; and the fourth, for uttering and passing such coin. .....

A third point made by defendant is, that the indictment presents more than one public offense, in violation of section 2917, of the Code, which provides that "an indictment must present but one public offense, but such offense may be therein charged in different forms to meet the evidence in the case."

The prisoner is prosecuted under sections 2634, 2635, of the Code, which provides for the punishment of those who shall forge and counterfeit any gold or silver coin; those having in their possession, with intent to utter or pass the same, five or more pieces, knowing, &c., with intent, &c.; and those having less than five, with intent, &C. Any person guilty of the first and second offenses, is liable to be punished by imprisonment in the penitentiary, not more than ten nor less than one year. The third offense is punished by imprisonment in the penitentiary. not exceeding eight years, or fined not more than five hundred dollars and imprisoned in the county jail not exceeding one year.

A defendant cannot be charged with two distinct offenses in a single count of an indictment. A greater difference of opinion will be found to exist upon the question, as to how far, and to what extent, distinct offenses may be charged in different counts. Without adverting to the authorities, we may state this rule as one to which there is no just exception - that in cases of felony, where two or more distinct offenses are contained in the same indictment, it may be quashed, or the prosecutor compelled to elect on which charge he will proceed; but such election will not be required to be made, where several counts are introduced solely for the purpose of meeting the evidence as it may transpire, the charges being substantially for the same offense. Wharton's Cr. L. 204; Engleman v. State, 2 Carter, (Ind.) 91; Rex v. Jones, 8 Car. & P. 776; Rex. v. Trueman, I b. 727; 2 McLean 325; Coulter v. Com., 5 Met. 532; 7 Blackford, 186; Kane v. Com., 9 Wend. 203. And the same rule prevails in this State in cases of misdemeanor, the language of the Code (section 2917) being general, and including all offenses.

In the case before us, it does not appear that the several counts relate to distinct and different transactions. On the contrary, we can well conceive that the pleader would be fully justified in varying the charges, as he has in this instance, for the purpose of meeting every possible contingency in the evidence. And this is always permissible, (State v. Nelson. 29 Maine, 324; Wharton 207,) where it relates to the same transaction. Thus, while the proof might leave it uncertain whether the prisoner made and counterfeited the coin, there would be no doubt left upon the mind of the jury, that he had the same in his possession,

with intent to pass. And yet the testimony would relate to the same coin, and the same act or transaction. So, again, while the proof might not show that he had five or more pieces in his possession, it might establish the fact that he had less, and if so, he would be liable, even without the third count of the indictment. Code, section 3039; Com. v. Griffin, 21 Pick. 523. And therefore, where, as in this case, the jury have returned a verdict of guilty upon one count, and not guilty on the others; after a motion in arrest and for a new trial, based, among other things, upon this alleged misjoinder of offenses, has been overruled; and where there is nothing before us by bill of exceptions or otherwise, to show that the several counts relate to separate transactions, we cannot say that the indictment is subject to the objection urged. Cases might arise where the indictment upon its face would show that different offenses were included, as if larceny and perjury should be charged. Where it is not thus apparent, other parts of the record should make it appear in some method, that the counts relate to distinct offenses, or transactions.

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Affirmed.

State v. McCormack.

Supreme Court of Iowa, 1881. 56 Iowa 585, 9 N. W. 916.

"There are two counts in the indictment. The first charges that the defendant did feloniously, and with intent to defraud, falsely make, forge, and counterfeit a certain check, purporting to be signed by D. H. Porter, and the second that the defendant, with intent to defraud, uttered and published as true the check aforesaid.

The defendant demurred to the indictment, which was overruled. Whereupon he moved the court to require the State to elect upon which count the defendant should be tried, which was also overruled.

There was a trial by jury, verdict guilty, and judgment. The defendant appeals."

Seevers, J. - It is provided by statute: "The indictment must charge but one offense, but it may be charged in different forms to meet the testimony, and if it may have been committed in different modes and by different means the indictment may allege the modes and means in the alternative ....." Code, § 4300. It makes no difference under the statute whether the offenses are

charged in the same or different counts. For if more than one offense is charged the indictment is bad.

We have had occasion to construe this statute several times. See The State v. Eidment, 35 Iowa, 541; State v. Rhodes, 48 Id., 702; The Same v. Ridley & Johnson, Id., 370,: State v. McFarland, 49 Id., 99; State v. Thomas, 53 Id., 214.

The question for determination is whether the indictment charges more than one offense. The Attorney General does not in terms claim but a single offense is charged; but he insists this court has held that forgery, and uttering and publishing as true the forged instrument, may be charged in the same indictment. In support of this proposition the State v. McPherson, 9 Iowa, 53; State v. Farr, June Term, 1874, and State v. Nichols, 38 Iowa, 110, are cited.

The indictment in the last case is precisely like the one before us and both are based on the same statutes. It was held to be sufficient under the authority of the two other cases cited, under the supposition all were alike and we were bound by the former decisions. We are not constrained to say the assumption there was no difference between the two first and the last case was a mistake.

The indictment in the State v. McPherson was found under §§ 5634 and 5635 of the Code of 1851, which are identical with sections 3925 and 3926 of the Code. There were three counts in the indictment. "The first was for counterfeiting silver coin .....; the second for having in possession at the same time five pieces of false coin, knowing the same to be false, with intent to utter and pass, and the third for having less than five pieces of such coin with the same intent." The court said: "A defendant cannot be charged with two distinct offenses in a single count of an indictment;" but that the indictment is sufficient "where several counts are introduced solely for the purpose of meeting the evidence as it may transpire, the charges being substantially the same offense." And it was held that a charge of counterfeiting coin and having the same in possession with intent to utter did not constitute two distinct offenses, and therefore could be well united in the same indictment. This case does not meet the requirements of the one before us, because in the present case there is the charge the defendant uttered and published as true the forged instrument. It seems to us this is a different and distinct offense, and that it is not included in the crime of forgery. Both are defined and punished under different sections of the Code, and in a statutory sense the uttering is the greater offense, the punishment therefor being imprisonment in the penitentiary not exceeding fifteen years, and a fine not exceeding one thousand dollars. Code, § 3918. For forgery the punishment is imprisonment not exceeding ten years. Code, § 3917.

The State v. Farr follows the McPherson case, the indictment being in substance and legal effect the same. And the uttering is a distinct, additional and independent fact not essential to be established to obtain a conviction for uttering to establish the defendant is guilty of forgery. We think the offenses are distinct, independent, and cannot, under the statute, be united in th same indictment.

Reversed.

State v. Trusty.

Supreme Court of Iowa, 1904. 122 Iowa 82, 97 N. W. 989.

From a judgment of conviction of the crime of rape the defendant appealed.

Deemer, C. J. This is the second time this case has been before us. The opinion on the first appeal will be found in 118 Iowa, 498. The indictment is in two counts. The first charges a rape committed upon a child under the age of fifteen; and the second, a rape upon the same person, who, it is said was naturally imbecile, and so weak of mind as not to understand the nature of the act. This was undoubtedly done to meet the evidence in the case, and, viewed in this light, it was not objectionable.

Prior to the impaneling of the trial jury, the defendant filed a motion to require the state to elect upon which count of the indictment it would proceed. The motion was overruled, and this is assigned as error. The ruling was correct. There are two separate sections of the Code relating to the offense of rape. Under the first the defendant was guilty if he carnally knew a female child under the age of fifteen years, and under the second he was guilty if he had carnal knowledge of one who was an idiot; or had such imbecility of mind as to prevent effectual resistance, no matter what her age; but in either case the crime is rape. Indeed, defendant might have been convicted under either count if the state showed that the prosecutrix was so weak of mind as to be incapable of giving consent. State v. Atherton, 50 Iowa, 189. The indictment, therefore, was not bad for duplicity, and, as the charge in the two counts relates to the same transaction, there was no error in overruling defendant's motion. Grimes v. State, 105 Ala. 86 (17 South. Rep. 184); Mills v. State, 52 Ind. 187; State v. Houx, 109 Mo. 654 (19 S. W. Rep. 35, 32 Am. St. Rep. 686); Porath v. State, 90 Wis. 527 (63 N. W. Rep. 1061, 48 Am. St. Rep. 954). See, also, State v. Enright, 90 Iowa, 520; State v. McPherson, 9 Iowa, 55; State v. Baldwin, 79 Iowa, 715, - which lend support to these conclusions.

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Affirmed.

(c) Election.

A misjoinder of counts can ordinarily be corrected by an election on the part of the state to proceed only upon one count or only upon several counts which may properly be joined.

State v. Henry.

Supreme Court of Iowa, 1882. 59 Iowa 391, 13 N. W. 343.

The defendant appealed from a judgment of conviction under an indictment which charged him in one count with having forged a promissory note and in another count with having uttered as true the said forged note.

Day, J. - In State v. McCormack, 56 Iowa, 585, this court overruling State v. Nichols, 38 Iowa, 110, held that the forging and the uttering of forged papers could not be united in the same indictment. The decision in State v. McCormack, was announced in April, 1881, which was after the trial of this cause in the court below. In this case the defendant's attorney, following probably the rule announced in State v. Nichols, interposed neither demurrer, motion to require the State to elect on which count it would proceed, motion in arrest of judgment, objection to evidence, objection to sentence, nor motion for a new trial. The defendant waived the objection, which he might have urged, that the indictment charged two offenses, and went to trial upon an indictment charging in different counts offenses which should have been presented in two indictments. It is now urged that no legal conviction could be had upon the indictment because of its duplicity. We are of the opinion that this question cannot be for the first time raised in this court. See State v. Groome, 10 Iowa, 308; see, also, Knoll v. The State, 12 N. W. Rep., 369.

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Affirmed.

State v. Finnegean.

Supreme Court of Iowa, 1905. 127 Iowa 286, 103 N. W. 155.

From a judgment of conviction the defendant appealed.

Ladd, J. - The indictment, in charging larceny by embezzlement in the first count, and by theft in the second, is said to violate the statute providing that "the indictment must charge but one offense, but the particular crime may be charged in different forms to meet the testimony, and, if it may have been committed in different modes and by different means, may allege the modes and means

in the alternative." Its validity then depends on whether larceny and embezzlement are but one offense. Larceny, as defined by statute, is like that at the common law, save in the increased number of articles made the subject of larceny. Sections 4831, 4834, Code. The crime of embezzlement is purely of statutory origin, intended to cover the misappropriation of property not punishable as larceny. Section 4834 of the Code defines embezzlement by a public officer; Section 4841, by a bailee; section 4842, by an agent or employe of a corporation, association, or individual; and section 4844, by carrier for hire; and in each the crime is declared to be larceny. But this is a mere conclusion, evidently intended for the purpose of fixing the punishment, for under similar statutes the charge of larceny has been held not to be sustained by proof of embezzlement. By giving a particular offense the same name as that borne by some other distinct and different offense, the Legislature cannot make the two but one, or change the nature of either, 2 Bishop's Criminal Practice, 318; Com. v. Simpson, 9 Metc. (Mass.) 138, in which it was said that "the two offenses of larceny and embezzlement are so far distinct in character that, under an indictment charging merely a larceny, evidence of embezzlement is not sufficient to authorize a conviction." Fulton v. State, 13 Ark. 168, or concluding that "although the party, in the language of statute, 'shall be deemed to have committed the crime of simple larceny,' yet it is a larceny of a peculiar character, and must be set forth in its distinctive character." At the common law both might be included in separate counts of the same indictment, but as distinct offenses growing out of the same transaction, and the jury was required to say in the verdict of which the accused was guilty. Griffith v. State, 36 Ind., 406; Rex. v. Johnson, 3 M. & S. 539. State v. Porter, 26 Mo. 201; Murphy v. People, 104 Ill. 528; 1 McClain's Criminal Law, section 656.

In the count charging embezzlement, it seems to have been necessary to include the allegation that the property had been stolen, apparently for that the act of Parliament, in creating the offense, designated it as larceny. Com. v. Pratt, 132 Mass. 246; State v. Fricker, 45 La. Ann. 646 (12 South. Rep. 755). This did not relieve the pleader, however, from stating the facts constituting embezzlement; and, in the absence of a statute authorizing conviction under indictment for larceny, the courts have generally held against the facts constituting the crime must be stated with such particularity as to identify it under the statute defining embezzlement. Bishop on Statutory Crimes, section 422. But in England, as well as in many of the States of this country, legislation has put the bailee in possession in the same attitude as servants having the naked custody of property; and authorized conviction under a charge of larceny. Bishop, Statutory Crimes, section 420. But in Texas, where the Constitution confers the right "to demand the nature and cause of the accusation," such a statute was condemned as an invasion of the fundamental law. Huntsman v. State, 12 Tex. App. 619. See also, Hall v. State, 3 Cold. (Tenn.) 125. These decisions are in point, as section 5282 of the Code contains a like provision. To constitute

larceny, a trespass is essential, while an embezzlement this is not necessary, but a fiduciary relation must be shown. Were the only difference the absence of the element of trespass in embezzlement, it might be included in larceny; but in its stead is that of the trust relation under which possession of the property is obtained, and this clearly distinguished the two crimes as distinct and separate. The charge of one ordinarily cannot be sustained by proof sufficient to convict of the other. People v. DeCoursey, 61 Cal. 134, is directly in point. The statute of that State prohibits charging more than one offense in the same indictment; and the court in holding these might not be so included, declared that "the two crimes are in their nature essentially different, and dependent on different facts." See State v. McFarland, 49 Iowa, 99; State v. McCormack, 56 Iowa, 585; State v. Terrill, 76 Iowa, 149. We think that the crimes of embezzlement and larceny are so different in their character that they should be treated in an indictment as distinct and separate offenses. It follows that the State ought to have been required to elect upon which count it would proceed.

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Reversed.

State v. Glaze.

Supreme Court of Iowa, 1916. 177 Iowa 457, 159 N. W. 260.

The defendant appealed from a judgment of conviction of embezzlement.

Salinger, J. - .....

IX. Section 5302 of the Code of 1897 provides that, in an indictment for embezzlement, it shall be sufficient to allege the embezzlement or fraudulent conversion to have been of money generally, without designating the particular species, and proof that the defendant embezzled any money or bank note will be sufficient to support the averment, although the particular species be not proved. The indictment here charged the receiving as cashier of "money, checks and drafts" belonging to the employer; that there was an embezzlement of "the aforesaid sum of money."

The defendant complains because the State was not compelled to elect whether it would rely for a conviction upon the defendant's having an embezzled money or checks or drafts. He insists further that there was no evidence to support the charge of embezzling checks or drafts. He says that while, under the statute, it was perhaps unnecessary to be specific on just what was embezzled, this presents a case of needless allegation which must be strictly proven as laid;

that the court erred in making it possible for the jury to find defendant guilty of embezzling checks or drafts; that it should have told it that there was no evidence to justify a verdict for such embezzlement; and that, assuming there was no error in refusing to compel the State to elect, it was yet error not to sustain the motion to direct on account of failure to prove said allegations of the indictment.

If distinct crimes are charged, the prosecution should be required to elect. State v. Fidment, 35 Iowa 541; State v. Abrahams, 6 Iowa 117. But distinct crimes were not charged. The indictment avers merely that money, checks and drafts were received and collected. Even if it were charged that it was money, checks and drafts that were converted and embezzled, there would be no duplicity. As well say that an indictment for larceny, being required to show that more than $20 in value was taken by a single theft, charged several crimes because it averred that the property stolen in one theft consisted of a calf worth $15 and a pig worth $6. It does not constitute multiplicity to charge that both money and drafts were taken, unless, in the language of Brown v. State, 18 Ohio St. 496, there should be a limiting and particularizing, such as putting "as many counts in an indictment as there were dollars of money embezzled." Passing that, while the indictment does say that those things were received, the crime charged is that of embezzling just money. As seen, the statute permits the indictment to allege an embezzlement of money generally, without designating its particular species.

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On other grounds the judgment was -- Reversed.

Section 4.

Joinder of Parties.

If an offense has been committed by two or more persons, while "the better practice is to indict them separately" (State v. Dingee (1864), 17 Iowa 232, 233), they may be indicted jointly. "When two or more defendants are jointly indicted for felony, any defendant requiring it may be tried separately, in other cases defendants jointly indicted may be tried separately or jointly, in the discretion of the court" (5375). The state, as well as the defendants, may file a motion for a separate trial, at least if the indictment is for a misdemeanor (State v. Marvin (1861), 12 Iowa 499).

State v. Brown

Supreme Court of Iowa, 1882. 58 Iowa 298, 12 N. W. 318.

Having been jointly indicted for rape and convicted of assault; the defendants appealed.

Day, J. The testimony introduced on the part of the prosecution tends to establish the following facts: On the evening of May 30th, 1880, the defendants, together in a buggy, with a led horse, came near the house of one Cuck Kelly. At that time, Ellen McNamee and John Kelly, a youth of about sixteen years of age, were coming south, in the direction of Cuck Kelly's house. The defendant, Darbyshire, asked the defendant, Brown, for the buggy to take Ellen McNamee buggy riding. Brown consented. Brown took the led horse and went with Cuck Kelly to the house. Darbyshire took the buggy and went back, and met the prosecutrix and John Kelly. Darbyshire asked the prosecutrix to take a buggy ride, and said he wanted to take her to a dance. She said she would not ride with him, but would walk with him to the house. Defendant got John Kelly to hold his horse, and he got out of the buggy. She put her arms around Kelly's neck, and the defendant pulled her away. Defendant got John Kelly to drive the buggy back, and he and the prosecutrix walked along together. They went south till they came close to a branch or slough, and there, the prosecutrix testifies, the defendant had intercourse with her. When they left there, she testifies he pulled her along to a straw stack, not far distant, and there had intercourse with her again. The defendant, Brown, remained at the house of Kelly about five minutes, and then rode on the led horse in the direction that Darbyshire had gone. He met John Kelly returning with the buggy, and got in the buggy and came back with him. In a few minutes he drove the buggy with the led horse back, and hitched them in a ravine near the straw stack. About the time that Darbyshire was leaving the straw stack, the prosecutrix saw Brown near it. She went around the straw stack and started across a rye field toward home, followed by the defendant Brown. As she was about to climb a fence he seized her and dragged her back, and had intercourse with her near the fence. At this time Darbyshire was driving away in the buggy. The prosecutrix testifies that she hallooed, and that these several acts were committed forcibly, and without her consent, and not withstanding her resistance. The testimony on behalf of the prosecution being closed, the defendants asked "that the State be required to elect whether it seeks to connect these defendants, or either of them, with the transaction, or act, occurring at the straw pile, and immediately contiguous thereto, in which it claims Frank Darbyshire carnally knew the prosecutrix, or the transaction at or near the fence near Aspergreen's, in which it accuses the defendant, George Brown, of having had carnal knowledge of prosecutrix, for that the whole record discloses the acts and transactions to be different and independent transactions." The State resisted this application upon the ground that the evidence discloses but one transaction, constituting but one offense. The court denied the application. If it should be

conceded that the defendants were conspirators, so that each was accessory to, and responsible for, the acts of the other, still the evidence of the prosecution tends to establish two distinct offenses If the defendants were so connected with all that was done, that eac is responsible for the act of the other, each was a principal in one act, and an accessory in the other. The acts of violence of the defendant Darbyshire and of the defendant Brown cannot be so blended together as to constitute but one transaction. Could an acquittal of the defendants, on account of what occured at the straw stack, h' pleaded in bar of prosecution for what occured in the field? Manifestly, it seems to us, it could not be so pleaded. If it could not be so pleaded, the transactions constitute distinct offenses. The court, we think, should have required the State to elect on which transaction it would proceed. In refusing to do so, and putting the defendants upon trial for two distinct offenses, there was error.

Reversed.

State v. McAninch.

Supreme Court of Iowa, 1915. 172 Iowa 96, 154 N. W. 399.

The defendants appealed from a judgment of conviction under an indictment which charged that "The said J. E. McAninch and C. S. McAninch on or about the 4th day of October, A. D. 1913, and from that date to the finding of this indictment, in the county of Jasper and state of Iowa, did wilfully and unlawfully assume the duties of a physician, and make a practice of treating persons afflicted with disease, and did then and there willfully and unlawfully, publicly profess to treat, cure and heal persons afflicted with disease, by a system of treatment called 'Chiropractic', without first having obtained from the state board of medical examiners of the state of Iowa, and recorded in the office of the county recorder of Jasper county, Iowa, a certificate authorizing the said J. E. McAninch and C. S. McAninch to practice as such, contrary to and in violation of law."

Salinger, J. .....

III. It is a fair analysis of the position of appellants that (1) what they are accused of having done jointly cannot be done jointly, and therefore it is impossible to prove what is alleged; (2) proof that either did what is charged would not accomplish the proving of any joint act; and (3) where a joint act is charged, and the proof be but that either or all of the defendants did the act severally, there can be no legal conviction of either or both under the joint indictment.

The ultimate proposition is that upon these premises it is apparent, upon the face of the indictment, that any trial had thereunder must end with a fatal variance between plea and proof.

While isolated sentences in argument and loose words in authorities relied upon convey the idea that the indictment is defective because it charges an impossible offense, they are, instead, merely an argument for the conclusion that this indictment is one under which no effective trial is possible. The consideration of this contention, involves, (1) whether a joint commission of the offense charged is impossible; (2, whether two may not be properly charged with the joint commission of it, even though two cannot (physically) jointly fail to procure and file a certificate, and whether, even though the offense charged cannot be committed jointly, it follows that because the charge is joint both must be acquitted, should the evidence show that one alone was guilty, or that both are, independently, guilty.

I.

It is true there are some cases for the proposition that some acts cannot rightly be joined in an indictment. It is equally true that some of these do not hold to the rule unqualifiedly, and, so far from attaching to such joining the consequence that all indicted must be acquitted without reference to what the proof of several guilty is, hold such misjoinder can be obviated and corrected. It may be granted, for the sake of argument, that a few of these first few hold that upon such misjoinder such consequence follows; but we believe these do not voice the weight of authority, and to a certainty do not announce what is now the law.

.....

2.

Now, on the contrary, it has been held that a joint indictment will lie for assault and battery on part of each defendant upon the other, and at the same time (State v. Lonon, 19 Ark. 577); against two persons for assault or battery on three (Fowler v. State. 59 Tenn. 154); against two as principals in the commission of rape (Dennis v. State, 5 Ark. 230,; against three for sodomy committed on the same man at the same time (Foster v. State, 1 Ohio Cir. Ct. 467); for unlawfully fishing in a pond at the same time, from the same boat, though each was fishing on his own account (Commonwealth v. Weatherhead, 110 Mass. 175); for having counterfeit notes in possession (Hess v. State, 5 Ohio 5); for violating the act to prevent illegal banking (State v. Presbury, 13 Mo. 342); against two persons composing a partnership, for making and signing, in their partnership name, a false return to the assessor of internal revenue (United States v. McGinnis, Fed. Cases 15678); that husband and wife may be jointly indicted for keeping a bawdy house (State v. Bentz, 11 Mo. 27); that there may be joint indictment in a single

count for engaging in the business of retailing drugs without a license (State v. Forcier, 65 N. H. 42, 18 Atl. 577); that two may be jointly informed against for selling liquor without a license (Commonwealth v. Harris, 7 Grat. (Va.) 600); and that two or more may be jointly guilty of being common sellers of wine and spirituous liquors without being first licensed as such according to law, and may be jointly indicted for that offense (Commonwealth v. Tower, 49 Mass. 527; Commonwealth v. Sloan, 58 Mass. 52). See Coates v. People, 72 Ill. 303.

3.

At one time it might fairly have been claimed that the rule invoked for appellants prevailed in this jurisdiction. But, as will presently be seen, this is no longer so. Without any special discussion for a citation of authority, and in fact without its being more than collaterally involved, we said in Hinkle v. Davenport 38 Iowa 355, that a joint action for slander cannot be maintained, and that if the same slanderous words be at the same time spoken of several parties, each must seek a separate remedy.

In Cogswell v. Murphy, 46 Iowa 44, we held that a joint action for trespass and damage by stock cannot be maintained against the several owners of the stock, and where such action is thus brought, advantage may be taken of misjoinder of parties, by answer and motion in arrest.

Port & Baldwin v. Yaw, 46 Iowa 323, decides that a joint action cannot be maintained against a common defendant by two parties who have distinct and separate causes of action, neither having any interest in the cause of action of the other. This case, however, somewhat weakens the Hinkle decision by ruling that in the last named case the result there reached might have been avoided by an amendment striking out the name of one of the parties, or dismissing the action as to one.

In Barnes v. Emmons, 53 Iowa 497, the appellant assigned error that the court erred in rendering a joint judgment. We hold that where the petition simply avers a joint tort, there is no misjoinder, and that hence the assignment made does not raise the question whether it is a fatal variance to allow a judgment against one defendant upon allegation of a joint tort. Though no holding we said that:

"The error, if any, of the court did not consist in rendering a joing judgment, but in rendering any judgment at all. A joint tort having been averred, it was incumbent upon the plaintiffs to show a joint tort. If that failed, no judgment of any kind should have been rendered."

It is plain that these words express no binding decision, and we so hold in Boswell & Tobin v. Gates, 56 Iowa 144, wherein

we say that an examination of the Barnes opinion "will show that this was said upon a point not raised, and not necessary to the decision." While it concedes the remark in the Barnes' case to be unobjectionable in a case like that of Cogswell v. Murphy, "it is not to be approved as an unqualified proposition, and in no view can it be regarded as authority."

For itself, the Boswell case decides that, in an action to recover for a tort in which two are joined as defendants, and wherein it is alleged that the tort was committed by them jointly, verdict that it was committed by one defendant alone may lawfully proceed to judgment against that one defendant.

Lull v. Anamosa Nat. Bank, 110 Iowa, at 544, also calls attention to the fact that the Boswell case has modified the Barnes decision. The Lull case cites the Boswell case, and holds, first, that a misjoinder must be taken advantage of by motion or be waived, and then proceeds to say:

"If plaintiff maintains his action against one of several defendants, he may have judgment against that one, and the other defendants may have judgment against plaintiff for costs. The rule is alike applicable to actions ex contractu and ex delicto."

IV. On analysis, it will be found that great weight of authority deals with this proposition on the simple theory that two equals two times one; that an accusation that A and B committed murder is, in logic, equivalent to asserting that A committed murder and that B did, and that, therefore, B may not escape because A proves innocent. And, as we put it in one of our earlier cases, an argument is not persuasive whereby "defendant seeks to escape not for the reason that he did not use a deadly weapon, but because he did not use all the weapons." State v. McClintock, 1 G. Gr. 392.

As to an indictment charging that A and B sold spirituous liquors unlawfully, it was held that evidence was admissible of sales by A alone, and that this constituted no variance; because says the Supreme Court of Connecticut, in State v. Wadsworth, 30 Conn. 55, 57, the indictment "is to be taken and understood distributively as against each of the accused severally, as well as jointly against both of them" - that is, A sold it, and so did B.

In Griffin v. Mills, 39 N. J. Law, page 587, it is held that several may be jointly tried for being common thieves, upon the theory that, if the offense be conceded to be several exclusively, the allegation that several committed the act is, in substance, equivalent to stating that each of them did it.

In 1 Chitty, Criminal Law, star page 271, it is said: Except a case like conspiracy and riot, where one alone cannot be guilty, and the acquittal of all others renders it impossible for the one

remaining to have committed the offense charged, the joint charge is several against each individual, and the jury may acquit some while others are found guilty; and, at page 270, that, in an indictment for burglary and larceny against two, one may be found guilty of the burglary and larceny and the other of larceny only.

On an indictment against two for being common sellers of intoxicating liquors "in a building then and there used by them as a shop", it was held in Commonwealth v. Brown, 78 Mass. 135, that one may be convicted. The exact point made was, "that, the offense being charged against both defendants jointly, in a place kept by both jointly, one could not be convicted without proof that the building was kept by both, as alleged in the indictment." In overruling this contention, the Supreme Court of Massachusetts said:

.....

V. Concede, for the sake of argument, that, literally, two men may not be jointly guilty of practicing medicine without first obtaining and recording a certificate required to make the practice lawful. It is still possible that one might aid and abet the other in this violation of law - that defendant B, knowing A was practicing illegally, did represent, actively, that this was not so, urged patients to come to A, and actually helped him in carrying on the unlegalized practice. Now since our statute provides that, for the purposes of indictment and trial, the accomplice is to be dealt with as a principal, this indictment is sustained by very many well considered authorities upon the theory that, even if the proof shows that A violated the law, and that B aided and abetted, an indictment charging both to have violated the law is valid.

.....

The cases rest; and our statutes were made, in recognition of the fact, that, in a literal sense, a joint offense is a practical impossibility; that two hands cannot inflict the same mortal wound nor two physically participate in an act which constitutes rape - rest upon appreciation that joint guilt always includes the guilt of each participant - proceed upon the theory that joint guilt is usually the act of one and the aid of another. Either reason is so sound that it is not material which one or more have put the great weight of authority, and our own statutes, behind the rule that no guilty one shall escape because the proof fails of showing that another was also guilty.

The indictment is good.

Amendments.

At common law the indictment, being the solemn act of the grand jury, could not be amended in any respect without the consent of that body. A few courts in this country have held that the court has power to amend mere matters of form, if no alteration is made in substance. This was accomplished in England by the grand jury expressly consenting in advance, at the time they were sworn, that such changes might be made by the court. Our law in this regard was made clear by the Thirty Third General Assembly (1909), which amended § 5289 of the Code by adding the following paragraphs:

"7. The county attorney may, at any time before or during the trial of defendant upon indictment, amend the indictment so as to correct errors or omissions therein as to matters of form, or to correct errors in the name of person or in the description of any person or thing, or in the allegations concerning the ownership of property that may be described in the indictment; but such amendment shall not prejudice the substantial rights of the defendant, or charge him with a different crime or different degree of crime from that charged in the original indictment returned by the grand jury.

"8. A notice of the time the state will ask permission to file such amendment, together with a copy of such amendment shall be served upon the defendant or his attorney, and an opportunity be given the defendant to resist the filing of such amendment. No continuance or delay in trial shall be granted because of such amendment, except upon the defendant's application, it appearing to the court that defendant should have additional time to prepare for trial because of the new allegations contained in the indictment.

....."

Since at common law the caption was no part of the indictment - no part of the act of the grand jury - it could be amended at any time so as to make it conform to the facts. It has been said under our procedure that "the caption is not a material part of the indictment" and hence can be amended; or does not offer ground for a motion in arrest of judgment if it is incorrect and was not amended (State v. Pelser, (1917) 182 Iowa 1).

State v. Kiefer.

Supreme Court of Iowa, 1918. 183 Iowa 319.

Having been convicted of the crime of fraudulent banking the defendant appealed.

5263-1

Ladd, J. - The defendant, with his two brothers, W. H. and John Kiefer, is alleged in the indictment to have engaged in the banking business as a copartnership, under the name of Kiefer Brothers Banking Company. It is also alleged that the company became insolvent, and, while so insolvent, said defendant "did knowingly accept and receive from one E. S. Burr" a certificate of deposit, previously by it issued, for $1,800, and issued to said Burr another certificate in its stead for $1,800. No copy of either instrument was attached thereto. It developed on the examination of E. S. Burr that his name was Eugene S. Burr; that the certificate issued was for $1,858.75, "payable to the order of self or wife," and was made to Eugene S. Burr. When offered in evidence, it was excluded, on the objection that it was not the certificate described in the indictment. Thereupon, the State applied for leave to amend that instrument, under Paragraphs 7 and 8, Section 5289, Code Supplement, 1913, which provides that:

"7. The county attorney may, at any time before or during the trial of defendant upon indictment, amend the indictment so as to correct errors or omissions therein as to matters of form, or to correct errors in the name of any person or in the description of any person or thing, or in the allegations concerning the ownership of property that may be described in the indictment; but such amendment shall not prejudice the substantial rights of the defendant, or charge him with a different crime or different degree of crime from that charged in the original indictment returned by the grand jury;

"8. A notice of the time the State will ask permission to file such amendment, together with a copy of such amendment, shall be served upon the defendant or his attorney and an opportunity be given the defendant to resist the filing of such amendment. No continuance or delay in trial shall be granted because of such amendment, except upon the defendant's application, it appearing to the court that defendant should have additional time to prepare for trial because of the new allegations contained in the indictment."

The application to amend proposed: (1) To "substitute" the name "Eugene S. Burr" in all places therein for E. S. Burr; (2) to "change and correct" the amount in the certificate surrendered by inserting $1,761.85, instead of $1,800, therein; and (3) to change and correct the certificate issued, by inserting $1,858.75 instead of $1,800; and (4) to insert, after the words "the property of the said E. S. Burr," the words, "a more particular description of which is to the grand jury unknown." Neither the proposed amendment nor a copy thereof was attached, nor was a copy of the alleged amendment ever served on the defendant, but the application was duly served. Such amendment was, in form and substance, a new and complete indictment, without endorsements as having been returned by the grand jury; and the State, while denominating it in the title, "amendment to indictment," states that it "amends" in pursuance of permission of the court, and "hereto sets forth the amended indictment." Then follows the amendment, in the form

of an indictment, containing not only the changes sought, but enough else to make it apparently complete in itself. But the State was without authority to amend in any respect save that authorized by this statute. There is no provision permitting the filing of an amended and substituted indictment. Such an instrument can only be returned by the grand jury upon resubmission to that body. The State is limited by the order of the court, on application, to precisely the changes or corrections therein permitted, and anything in excess thereof must be regarded as surplusage. Had the amendment been served on the accused, as exacted by statute, and the same ruled on by the court, it might cover every correction or change permissible thereunder. But only the motion was served and ruled on by the court; and therefore the State, in drawing the amendment, might not make other changes or corrections than authorized by the ruling thereon. Of course, it is not often material how an amendment is denominated: the important consideration is, what it really is. This amendment in form is something more than a mere amendment; but, as said, anything other than within the order of the court was utterly without authority of law, and especially is this true of that part specifically charging the offense against him only. Doubtless the omission of the names of the other brothers from the amendment was due to oversight, owing to the fact that Adam Kiefer alone was on trial. The indictment was without defect in these respects. The law did not authorize an amendment in either respect, nor was it permitted by the court. Any matter included in the amendment by the county attorney other than permissible by statutes and authorized by court must be regarded as surplusage, as not being returned by the grand jury; and, as the trial court proceeded on this theory, and the cause was tried on the original indictment as corrected by the amendment only in the respects proposed, there was no error.

II. In serving notice of the application to amend, a copy thereof also was served, but no copy of the amendment was ever served on the defendant. He specifically objected to the application on this ground: "(6) That no copy of the proposed amendment has been served on the defendant." In overruling this objection, the court denied the defendant the benefit of Paragraph 8 of Section 5289 of the Code Supplement, 1913. The right to amend an indictment returned by the grand jury, accorded the county attorney, was on certain specified conditions, among which was the service of a copy thereof on the accused. This was to advise him both of the substance and form of the proposed amendment, to the end that "an opportunity be given the defendant to resist the filing of such amendment." Undoubtedly, the court erred in overruling the objection that a copy of the amendment had not been served, but the error was waived by the fact that counsel for the defendant interposed objections to the amendment itself, when filed, and that his attention was directed thereto by the court, and he resisted the filing thereof. He could have done no more had the copy been served. Every purpose of such service had been accomplished, and we are of opinion that the error in the ruling of the court and the failure to serve a copy of the amendment on defendant were waived. In any event, he was in no wise prejudiced.

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we are required to "examine the record without regard to technical errors or defects which do not affect the substantial rights of the parties" (Section 5462, Code), and it is plain that this could have had no influence on the course of the trial.

III. Appellant contends that the amendment, in effect, substitutes different certificates from those described in the indictment, in that the application asks to "substitute" the name Eugene S. Burr" for "E. S. Burr," and to change and correct the amounts of said certificates. If the amendment charged the defendant with a different crime from that alleged in the indictment, leave to file it ought not to have been granted. We do not so construe the amendment. The statute quoted authorizes an amendment correcting (1) "errors or omissions therein as to matters of form," (2) "errors in the name of any person," (3) "in the description of any person or (4) thing, or (5) in the allegations concerning the ownership of property that may be described in the indictment." All this may be done provided the accused is not prejudiced in his substantial rights, and a different crime is not charged. The propriety of amendments in these respects, as well as the power of the general assembly to authorize them, was fully vindicated in State v. Mullen, 151 Iowa 392, and the granting of leave to amend was approved in State v. Foxton, 166 Iowa 181, and State v. Kiefer, 172 Iowa 306. It will be observed that the matters enumerated relate to form, rather than to the substance of the charge; and whether the general assembly might authorize an amendment affecting the substance of the charge is not and could not well be involved in construing this statute. But see State v. Mullen, supra; Jones v. McClaughry, 169 Iowa 281.

(a) It is first objected that the amendment sought to "substitute" the name "Eugene S. Burr" instead of "E. S. Burr," and it is argued that this did not have the effect of correcting the name of the person to whom the certificates were issued, but of inserting the name of a different person. In the absence of any showing to the contrary, letters preceding the surname are to be treated as the Christian or given name; but this is not often so, for such letters ordinarily stand for full names. Riley v. Litchfield, 168 Iowa 187. And where the latter are substituted in the description of a particular instrument, it is not to be inferred that a different person was intended, but that the names for which the letters stood were intended to be stated. Such clearly was the design of the amendment, and it ought not to be construed as alleging a different person than named in the indictment. Especially should this be the rule where the evidence previously adduced conclusively proved, as here, that E. S. Burr and Eugene S. Burr was one and the same person.

(b) The amendment changed the amount in both the certificate surrendered and that issued in lieu thereof. This was merely a correction of the description of these certificates. These were things described in the indictment, and the statute expressly authorizes correction of any error in the description of any "thing." The application to correct the description indicated

that the amendment would relate to the same instrument as the indictment, and both, in fact, related to the same certificates. The corrections were permissible.

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Affirmed.

Salinger, J. (dissenting). I. The statute, Paragraphs 7 and 8 of Section 5289, Code Supplement, 1913, permits amendment "as to matters of form ..... in the name of any person or in the description of any person or thing, or in the allegations concerning the ownership ....." But it still prohibits charging "a different crime or different degree of crime." Without this statute permission, no change could be made. It follows none but such as are expressly permitted can be made. The amendment here changes the allegation of the original that Adam Kiefer, W. H. Kiefer, and John Kiefer commited the crime charged, to one that Adam Kiefer alone did. The statute does not authorize such changes. It is no answer that such change was not authorized by statute nor by the court, and is, therefore, surplusage. This reasoning would make it immaterial that the act was unauthorized. Indeed, under it, the more the change lacked authority, the less effective would complaint of the change be. As to lack of permission by the court, it suffices to say that the State was permitted to try defendant on the charged indictment.

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I am authorized to say that Mr. Justice Weaver joins in this dissent.

THE INFORMATION.

An information is a written accusation of crime preferred by the public prosecuting officer without the intervention of the grand jury. Of this Blackstone has said (IV Comm. 309) that "there can be no doubt but that this mode of prosecution by information (or suggestion) filed on record by the King's attorney general, or by his coroner or master of the crown office, in the court of the King's bench, is as antient as the common law itself." The common law required that all felonies should be prosecuted by indictment, while misdemeanors could be prosecuted either by indictment or by information. The original provision of the Constitution of Iowa was that "all offenses less than felony, and in which the punishment does not exceed a fine of one hundred dollars, or imprisonment for thirty days, shall be tried summarily before a justice of the peace, or other officer authorized by law, on information under oath, without indictment, or the intervention of a grand jury, saving to the defendant the right of appeal; and no person shall be held to answer for any higher criminal offense, unless on presentment or indictment by a grand jury, except in cases arising in the army or navy, or in the militia, when in actual service, in time of war or public danger" (Article 1, Section 11). The latter part of this section was amended in 1884 by the provision that "the general assembly may provide for holding persons to answer for any criminal offense without the intervention of the grand jury" (Article 5, section 15). This provision remained dormant until 1911, when the Thirty-Fourth General Assembly passed "an act to provide for prosecuting criminal offenses to final judgment on information to be filed by the county attorney, and without the intervention of the grand jury in cases in which the punishment exceeds a fine of one hundred dollars, or exceeds imprisonment for thirty days, and to provide the procedure when so prosecuted on information" (34 G. A., ch. 188; amended by 38 G. A., ch. 229. Compiled Code §§ 9280 to 9298 inclusive).

Whenever an accused has had, or waived, a preliminary examination and has "been held to the grand jury to answer therefor, the county attorney of the proper county may, prior to the impaneling of the next regular grand jury, file in the district court, either in term time or in vacation, an information under oath, charging said accused with the offense for which he has been held to the grand jury, or for any degree or grade thereof, or for any offense included therein" (Comp. Code § 9281)." Such information shall be indorsed, 'a true information, which indorsement shall be signed by the county attorney" (Comp. Code § 9282); and there shall also be indorsed on the information the names of the witnesses whose evidence he expects to use at the trial. With the information shall be filed "a minute of the evidence relating to the guilt of the accused of the offense charged of each witness whose name is so indorsed upon the information" (Comp. Code § 9283). No information can be filed unless it is

sworn to by the county attorney and approved by the judge of the district court. If the judge disapproves it, "the charge shall be presented to the next grand jury for consideration"(Comp. Code § 9284). "The clerk of the district court shall cause a copy of the information and minutes of evidence to be delivered to the accused, or to his attorney, at or prior to the time of arraignment" (Comp. Code § 9285). In general the rules applicable to indictments apply also to informations for indictable offenses (Comp. Code §§ 9286 to 9297 inclusive). It is provided (Comp. Code § 9298) that the "information shall be, substantially in the following form:

IN THE DISTRICT COURT OF _ _ _ _ _ _ COUNTY.

THE STATE OF IOWA,
VS. } INFORMATION.
A_ _ _ _B_ _ _ _

Comes now ....., as county attorney of .... county, state of Iowa, and in the name and by the authority of the state of Iowa accuses A ..... B ..... of the crime of (here insert the name of the offense), committed as follows:

The said A ..... B .... , on or about the ..... day of ....., A. D. ..... (inserting the year) in the county of ....., and state of Iowa, (here insert the acts or omissions constituting the offense).

.....
County Attorney.

STATE OF IOWA, } ss.
.....COUNTY}

I, ... , being first duly sworn, do depose and say, that I have made full and careful investigation of the facts upon which the above charge is based, and that the allegations contained in the above and foregoing information are true, as I verily believe.

.....

Subscribed and sworn to by .....before me, the undersigned, this ..... day of ....., A. D. .....

.....
(Here insert title of official before whom verification is made.)

Upon the information shall be indorsed the following:

(a) A true information

.....
County Attorney.

(b) Names of witnesses:
.....
.....
.....
.....

(c) On this .....day of ....., A. D. ..... being satisfied from the showing made herein that this cause should (or should not, as the case may be) be prosecuted by information, the same is approved (or disapproved and the charge is ordered submitted to the next grand jury, as the case may be).

.....
Judge of District Court.

(d) This information duly filed in the district court, this ..... day of ....., A. D. .....

.....
(Clerk of the District Court of .....County, state of Iowa.)
By .....
Deputy Clerk.

(e) Bail is hereby fixed on the within information in the sum of $.....

.....
(Here insert official title of judge or clerk, as case may be.)

(For cases under this chapter of the Code see Jones v. McClaughry (1915), 169 Iowa 281, 151 N. W. 210; State v. Fisher (1915) 172 Iowa 462, 154 N. W. 578. For the information for non indictable offenses see Code §§ 5576 to 5579 inclusive).

Devine v. State.

Supreme Court of Iowa, 1857. 4 Iowa 443.

The defendant having been convicted on an information filed before a justice of the peace and the judgment of conviction having been affirmed in the District Court, the defendant appealed to the Supreme Court.

Wright, C. J. - .....

In the second place, it is insisted that the information was not subscribed and sworn to as required by the Code, § 3323. The exact point here made, it is somewhat difficult to understand. It appears that the complaint or information was made and presented by one Pauly. After charging the defendant with having sold liquor to the several persons therein named, we find at the close thereof, the following affidavit:

"The State of Iowa, Benton county: I, James L. Pauly, being duly sworn, depose and say, that I believe the matters and things set forth in the above and foregoing information, are true.
JAMES L. PAULY.

"Subscribed and sworn to before me, this 30th day of January, A. D. 1857. Wm. C. Smith, J. P."

As we understand the objection, it is that the informant should have subscribed his name at the close of the information, and not to what is termed the affidavit. The affidavit, however, is a part of the information, and when the complaining party affixes his signature to it, he subscribes to the information, within the full meaning of the law.

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Affirmed.

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CHAPTER VII.

STEPS BY THE STATE AFTER THE INDICTMENT.

Section 1.

THE ARRAIGNMENT.

After the indictment, or the information for an indictable offense, there are several steps which may be taken by the state before trial, one of which - the arraignment - is of such a nature that the trial cannot proceed without it, unless it has been waived by the defendant.

As has been shown in another place, the person indicted may or may not be in the custody of the law. If he is not, and does not voluntarily submit to the jurisdiction of the court, it is necessary that he be brought in. By the early English practice, if he was indicted for a misdemeanor only, a venire facias ad respondendum was issued. This was a writ summoning the defendant to appear and be arraigned for the offense. If he was indicted for a felony, or if he was indicted for a misdemeanor and did not respond to the venire facias, the court issued a capias which commanded the sheriff to take the defendant and have him at the next assizes. Our practice does not make any distinction between felonies and misdemeanors in this regard, but in every case in which it is necessary to bring in a person who has already been indicted, a bench warrant is issued for that purpose. Being issued by the court itself it is called a "bench warrant" to distinguish it from a warrant issued by a magistrate. (5303 to 5309 inclusive. In case of information for an indictable offense see Supp. '13 § 5239 j).

"As soon as practicable after an indictment is found, the defendant must be arraigned thereon, unless he waive the same; but where a corporation is defendant, arraignment" is not required (5310 and see Comp. Code '19, § 9294). The arraignment "consists in reading the indictment to the defendant, and, unless previously done, delivering to him a copy thereof and the indorsements thereon and informing him that, if the name by which he is indicted is not his true name, he must then declare what his true name is, or be proceeded against by the name in the indictment, and asking him what he answers to the indictment" (5315). It "may be made by the court, or by the clerk or county attorney under its direction" (5315). If the indictment is for a misdemeanor the defendant may appear by his counsel, but if he is charged with a felony, or if he has no counsel, he must be personally present for arraignment" (5311). A conviction cannot be supported if there has been neither an arraignment, nor any waiver thereof (Powell v. U. S. (1839) Morris 17), "but it is not necessary that an arraignment be formally waived. There may be such acts on the part of the defendant

as in law should be held to amount to such a waiver" (State v. Thompson (1895) 95 Iowa 464, 64 N. W. 419).

Section 2.

Motions

A motion is "an occasional application to a court by the parties or their counsel, in order to obtain some rule or order, which becomes necessary either in the progress of a cause, or summarily and wholly unconnected with plenary proceedings" (Black's Law Dict. See ¶ 3831 to 3846 inclusive for provisions as to motions in the Code of Civil Procedure.) Since there are no peculiar motions by the state subject to special rules and provisions such for example as the defendant's motion to set aside the indictment, it is sufficient merely to mention that if an occasion arises which entitles the state to some special rule or order, it may file a motion therefor. If the wording of the defendant's plea was unnecessarily vulgar or obscene, the state could file a motion to strike it from the files. Since the statutory forms for the defendant's pleas offer no opportunity for such language this is not likely to occur, but if a defendant did so word his plea such a motion would lie. A prosecuting attorney, after drawing a bill of indictment which has been found to be a true bill by the grand jury and has been duly presented by them is not likely to wish to have this indictment set aside, but if he is convinced that the indictment is defective in some particular he may file a motion to have the indictment set aside and the case resubmitted to the grand jury; and it has been held that if the defendant successfully resists this motion by convincing the court that the point suggested by the state does not in fact constitute a defect, he will be unable to secure a reversal in the supreme court on the ground that the indictment was defective in this regard, even though that court is of the opinion that the indictment was thus defective (State v. Hanlin (1907), 134 Iowa 493, 110 N. W. 162). Should the state for any reason be entitled to a postponement of the trial it is entitled to file "an application for a continuance of the cause," which it is reversable error to overrule if made upon a proper showing (State v. Painter and Lindley (1875), 40 Iowa 298). Furthermore, if the county attorney should deem it advisable to have the prosecution dismissed, he may file an application for that purpose (5539).

Demurrer.

If the defendant files a plea which, as a matter of law, is insufficient on its face for the purpose for which it is filed, the state may demur thereto. The statutory forms practically exclude such a possibility as this. But in Peters v. State (1851,) 3 G. Greene 74) which was before the time of the statutory forms of pleas, the judgment of guilty was reversed because the case was tried upon an improper plea. The state should have file. either a demurrer or a motion to strike from the files.

Section 4.

Nolle Prosequi.

The rule of the common law was that "at any time, at least before the traverse jury was impaneled and sworn to try the cause, it was competent for the prosecutor to nol. pros. the entire indictment, without prejudice to a further or fresh proceeding fo the same offense" (State v. McPherson (1859) 9 Iowa 53). It was said that "the power to enter a nolle prosequi exists in the prosecuting officer. He exerts it upon his official responsibility. The court has no right to interfere in its exercise" (State v. Smith (1870), 49 N. H. 155, 6 Am. Rep. 480). But by the Code it is provided that "the court, upon its own motion or th application of the county attorney, in the furtherance of justice, may order the dismissal of any pending criminal prosecution, the reason therefor being stated in the order and entered of record, and no such prosecution shall be discontinued or abandoned in any other manner. Such a dismissal is a bar to another prosecution for the same offense if it is a misdemeanor; but it is not a bar if the offense charged be a felony" (5539).

Since the nolle prosequi is a right belonging to the prosecuting officer, and with which the court has no right to interfere, and since under the Code the only right to dismiss a crimin prosecution resides in the court, it follows that there is no suc thing as a nolle prosequi in Iowa Criminal Procedure.

CHAPTER VIII.

STEPS BY THE DEFENDANT.

Section 1.

Bail.

It is probable that no step more frequently takes first place in the mind of one who finds himself in the custody of the law, than that of being released on bail. It is therefore properly considered at this point, although the initial step in the matter of bail is not always taken by the defendant (a warrant of arrest on a preliminary information for a misdemeanor, or on an information for a non-indictable offense (5580) must state the amount in which bail may be taken (5185); the same is true of a warrant of arrest for one who has been indicted for a bailable offense (5305, and see Comp. Code 9288)), and in spite of the fact that bail is not entirely limited to proceedings that take place prior to the trial (5096, 5442 and 5506).

The word "bail" comes from the French "bailler" (to deliver). As a verb, it means the delivery of the body of the accused by the public officer to private "jailers" (State v. Brown (1864), 16 Iowa 314) who "are bound to have him as much in the power of the court, as he would be in the custody of the proper officer." As a noun, it refers to his "jailers" and also to the security which is given for his appearance. As the accused is supposed to be in the friendly custody of his bail, they may "at any time before the forfeiture of their undertaking ..... surrender the defendant in their exoneration "(5528) and for that purpose they may arrest him or have him arrested in any part of the state (5529).

The Constitution of Iowa provides that "all persons shall, before conviction, be bailable by sufficient sureties, except for capital offenses, where the proof is evident, or the presumption great "(Article 1 section 12) and "excessive bail shall not be required" (Article 1 section 17). Except for the last clause, this is restated in the Code with a provision that applies after conviction, in these words: "All defendants are bailable both before and after conviction, by sufficient surety, except for offenses punishable with death under the laws of the state when the proof is evident or the presumption great. No defendant convicted of murder in the first degree, or of the crime of treason shall be admitted to bail" (Supp. '13) § 5096, and see Code of '97 § 5442.) If the defendant is arrested for a misdemeanor under a warrant, the warrant will specify the amount of bail (5185, 5580, 5305 and Comp. Code 9288) and the officer serving the warrant must take the defendant before a magistrate or the clerk of the district court, for the purpose of giving bail (5502). If the defendant is arrested for a felony "the officer arresting the defendant must deliver him into custody according to the command of the warrant" (5503) but when he is so delivered, "if the felony charged be bailable, bail must be taken by that court, or its clerk, or by any magistrate in the same county" (5504). If he is arrested without a warrant the right to bail is the same as if he is arrested by virtue of a warrant

except that the amount of bail cannot be fixed in advance and hence must be fixed after his arrest for all offenses which are bailable (5208 to 5215 inclusive).

The purpose of committing to jail a person who has been charged with crime is not to punish him. So far the state has no right to punish him because his guilt has not been established. The purpose is merely to secure his presence in order that he may be tried, and, if found guilty, punished. The object of bail, therefore, is to provide a means of relief from an imprisonment which is imposed merely as a matter of precaution. From this it follows that it should be so regulated as reasonably to insure that the defendant will be present when he is needed. Thus at common law, the matter of bail being entirely a matter of the discretion of the magistrate or judge, it was felt that there was ordinarily no way to insure the appearance of one charged with a capital offense other than by keeping him in custody, and bail was commonly denied in such cases; while the probability that one charged with a misdemeanor could be induced to come to court by financial pressure was considered so great that bail was almost never denied to one so accused. In the case of felonies not punishable by death there was not thought to be any definite presumption either way. As we have seen, our Constitution and Code do not leave much to the discretion of the magistrate or judge on the question of whether bail shall or shall not be granted. Such discretion is entirely limited to the determination of whether the "proof is evident, or the presumption great" that one charged with a capital offense is guilty. But the discretion still exists in the matter of deciding what will be sufficient to induce the accused to appear, subject always to the limitation that "excessive bail shall not be required."

Before an accused was delivered from the custody of the official jailer into the "friendly custody" of his private jailers, at common law, security was required in the form of either a recognizance or a bond. "A recognizance at common law was an obligation entered into before some court of record or magistrate duly authorized, with a condition to do some particular act, as to keep the peace or appear and answer to a criminal accusation. It was not signed by the party entering into it. (Shattuck v. People, 4 Scam. 477; 2 Blackstone's Com. 341.) A recognizance differs from a bail bond merely in the nature of the obligation created. The former is an acknowledgment of record of an existing debt; the latter, which is attested by the signature and seal of the obligor, creates a new obligation" (People v. Barrett (1903), 202 Ill. 287, 297, 67 N. E. 23, 63 L. R. A. 82, 95 Am. St. Rep. 230). Our statutory undertaking is not exactly, either the recognizance or the bond of the common law. The Code of 1851 said (§ 3219): "Bail is put in by a written undertaking executed by one or more sufficient sureties (with or without the defendant, in the discretion of the court or magistrate,) and acknowledged before the court or magistrate taking the same". This is a recognizance and was so called by the court in 1856 (State v. Carr, 4 Iowa 289). But by the time of the Revision of 1860 a statutory form had been provided for this undertaking. (Rev. of 1860, § 4968, in which the idea of the recognizance was not

retained. A recognizance is an "acknowledgement of record of an existing debt", subject to a condition subsequent, but in the statutory form of 1860 the sureties undertook that the defendant should appear at the district court etc., and promised that they would pay a certain sum to the state of Iowa if he did not. That is it was a promise to pay upon the happening of a condition precedent rather than the acknowledgement of an existing debt subject to a condition subsequent. It was still required to be acknowledged although this requirement has since been omitted (5501, and see 5613. But curiously enough this requirement is still found in the undertaking for bail after indictment, 5505). In 1860 the court in the same sentence referred to the undertaking as a recognizance and as a bond (State v. Elgin, 11 Iowa 216, 218), and it is today commonly called a bail bond (see State v. Sandy (1908), 138 Iowa, 580, 581).

The qualifications of a surety on a bail bond are that he "must be a resident and householder or freeholder within the state, worth the amount specified in the undertaking, exclusive of property exempt from execution; but in taking bail each signer may justify severally in amounts less than that expressed in the undertaking, if the whole be equivalent to one sufficient bail" (5507). Each surety must justify by an affidavit stating that he possesses these qualifications (5508), and may be required to appear and be examined under oath (5509). Other evidence as to the sufficiency of the bail may be received if necessary (5509).

Although there was no such provision at common law, it is provided by the Code that any one in custody who is entitled to bail may secure his release by depositing with the clerk of the district court the sum mentioned in the order admitting him to bail (5524 to 5527 inclusive). Another provision of the Code which has no counterpart in the common law is that "undertakings of bail, immediately after filing by the clerk of the district court, shall be docketed and entered upon the lien index as required for judgments in civil cases, and, from the time of such entries, shall be liens upon real estate of the persons executing the same, with like effect as judgments in civil actions (5513, and see 5514). Bail should not be confused with security to keep the peace, as to which see 5105 to 5118 inclusive).

State v. Merrihew.

Supreme Court of Iowa, 1877. 47 Iowa 112, 29 Am. R. 464.

In an action on a bail bond the defendants appealed from a judgment sustaining a demurrer by the plaintiff to the defendants' answer.

Day, Ch. J. -

II. It is urged that the court erred in sustaining the demurrer to the defendants' answer. The provisions of our Code upon the question involved, and by which it must be determined, are as follows: Section 4593. "At any time before the forfeiture of their undertaking, the bail may surrender the defendant in their exoneration, or he may surrender himself to the officer to whose custody he was committed at the time of giving bail. ....." Section 4596: "If the defendant fail to appear for arraignment, trial or judgment, or at any other time when his personal appearance in court may be lawfully required, or to surrender himself in execution of the judgment, the court must direct an entry of such failure to be made on the record, and the undertaking of his bail, or the money deposited instead of bail, as the case may be, is thereupon forfeited." Section 4597: "If, before the final adjournment of the court for the term, the defendant appear and satisfactorily excuse his failure, the court may direct an entry to be made on the record that the forfeiture of the undertaking or deposit be discharged." Section 4598: "If the forfeiture is not discharged, the district attorney may, at any time after the adjournment of the court for the term, proceed by civil action only upon the undertaking of the bail." Section 4600. "If, before judgment is entered against the bail, the defendant be surrendered or arrested, the court may, in its discretion, remit the whole or any part of the sum specified in the undertaking." The answer admits that default was taken and the bond was forfeited at the time alleged. The defendants rely for their discharge upon the fact that, when the forfeiture was entered, the defendant was in the custody of the officers and agents of the State in Lucas county. The defendants, although in the eye of the law they were the gaolers of the plaintiff, and bound to know of his whereabouts, did not appear at the term at which the principal was bound to appear and make known any reason, or show any cause, why forfeiture of the bond should not be entered. If they had appeared before forfeiture, and informed the court that J. B. Merrihew was in custody in Lucas county, the court might have continued the case, and taken steps, or furnished the defendants the means, to procure his attendance. In Alquire v. Commonwealth, 3 B. Monroe, 349, to a acire facias, upon a recognizance entered into by Joseph and Michael Alquire, for the appearance of said Joseph in the Kenton Circuit Court, the defendants pleaded that, on the day designated in the recognizance for the appearance of Joseph in the Circuit Court of Kenton county, he was taken and held in custody by the commonwealth and kept in prison in the city of Louisville on a charge of felony, and has been kept imprisoned by said commonwealth ever since. A demurrer to this plea was sustained, and the judgment was affirmed in the Court of Appeals. The opinion of the court is so pertinent to the present case that we quote freely therefrom. The court say: "As the commonwealth, acting only through numerous and distant agencies, cannot be supposed to know at once all that may be done by them in her name at different places, she could not avail herself of the arrest and imprisonment of the principal in Louisville, or Jefferson county, for the purpose of trying him in the county of Kenton, unless information of the arrest were communicated to the

Kenton Circuit Court, whereby that court might take steps for having the prisoner brought before it immediately or after the prosecution in Jefferson should be disposed of; or unless information of the Prosecution and recognizance pending in the court of kenton were communicated either to the Jefferson Circuit Court or to some tribunal, having jurisdiction of the second prosecution, or at least over the prisoner, so that he might have been transmitted to Kenton county at once, or after an acquittal, should he be acquitted of the second charge. As the question is upon the breach of a recognizance for his appearance in the Kenton Circuit Court, which had in fact the first claim upon the body of the accused, it would seem that, to make the subsequent imprisonment available, as a substantial compliance or a virtual attainment of the objects of the recognizance, it should have been communicated to that tribunal in such authentic and formal manner as to have authorized its proper action in the premises. And as the defendants were bound by the recognizance for the appearance of the prisoner in the Kenton Circuit Court, and were also bound to know of the subsequent imprisonment, and as no other persons were bound to know or communicate a knowledge of both proceedings, it would seem farther to have been incumbent upon them, and especially upon the bail, in order to make the second arrest and imprisonment operate as a discharge from responsibility on the recognizance, to have made such communication to the court in which they were bound as would have placed the prisoner, though in custody at Louisville, substantially and practically within the power of the Kenton Circuit Court, and it may have been the duty of the bail, and a necessary step for his exoneration, that he should have moved in that court for such process as would have actually enabled him to surrender the body of his principal in court, Had he done so at any time during the term, though after the day appointed for the appearance of the principal, we suppose that the recognizance might at least have been respited until the proper steps had been taken for rendering the arrest at Louisville available for the objects of the recognizance, and that the bail might have entitled himself to ultimate exoneration, either upon the production of the prisoner for trial in Kenton, or upon its being made to appear that he was convicted in Jefferson and undergoing his sentence." Our statute provides the course which the bail may pursue in order to surrender a defendant. Code, § 4593. If the defendants had appeared before the forfeiture, and had shown that they procured a certified copy of the recognizance for the purpose of arresting and surrendering the principal, and that they were prevented from making such arrest and surrender because the principal was in custody in Lucas county, there would have been more merit in their position, although we do not determine that this would have entitled them to a discharge. But they do not show that they pursued any steps which the law authorizes and requires. They simply aver that they demanded the body of J. B. Merrihew of the officers and agents of the State. It does not appear that they exhibited any authority for such demand, or that it was made in such manner that the officers of the State would have been justified in complying with it. If it should even be conceded that the facts alleged in the answer would have been sufficient to prevent a forfeiture until the sureties could have an opportunity of taking the legal steps for the arrest and

procuring the presence of the principal, if they had been presented at the proper time, for that purpose, it cannot be admitted that they may now be made available as a defense to this action. In the State of Iowa v. Scott, 20 Iowa, 63, it is said that, after forfeiture, the only provision of the statute that aids a bail is section 4994 of the Revision, 4600 of the Code. The provisions of this section have already been quoted. Appellants cite and rely upon Commonwealth v. Webster, 1 Bush (Ky.), 616; Caldwell v. The Commonwealth, 14 Grattan, 698; The People v. Bartlett, 3 Hill, 570; Belding v. State of Arkansas, 25 Arkansas, 315; Taintor v. Taylor, 36 Conn., 242, and The People v. Tubbs et al., 37 N. Y., 586. In Commonwealth v. Webster, it was held that a surety on a bail bond cannot be held responsible on the bond for the failure of the principal to appear, when the principal had been arrested and removed from the county by order of a provost marshal. The case seems to have arisen during the war. The court say; "The history of that period attests the omnipotence of a provost marshal, and when the principal in a bail bond was arrested by the order of that officer, an effort on the part of the surety to take him into custody would be not only unavailing, but might be perilous to himself." In Caldwell v. The Commonwealth the prisoner was in the penitentiary, at the time he was required to appear, under sentence for a felony. After the term of his sentence expired he was sent back to the jail of the county where he was to appear, was tried and acquitted. On scire facias it was held the bail was exonerated, because the prisoner's imprisonment in the penitentiary rendered it impossible for him to appear. In The People v. Bartlett it was held a good answer to a recognizance for the appearance of a prisoner, that intermediate the recognizance and the term of court therein mentioned, he was arrested and committed to jail in another county, where he was kept in confinement until after the day of appearance. In Belding v. The State of Arkansas it was held that the surety would be excused from liability if he could show that the principal was duly arrested and imprisoned by the military authorities. In The People v. Tubbs it was held that the inability of the principal to attend on account of sickness is good defense to an action against the sureties on the recognizance. And in Taintor v. Taylor it was held no defense for the sureties that the principal had been taken to another state, under a requisition from the governor, to answer for a crime committed there. The only one of these cases which seems to be in conflict with the views here expressed is The People v. Bartlett, 3 Hill, 570. The case seems not to have been very thoroughly considered, and it differs from this in that it does not appear that there had been any forfeiture of the recognizance declared. We think the demurrer was properly sustained.

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Affirmed.

State v. Row.

Supreme Court of Iowa, 1894. 89 Iowa 581, 57 N. W. 306.

"In February, 1888, the defendant, Joseph Row, was convicted in the district court of Boone county of the crime of manslaughter, and sentenced to five years' imprisonment in the penitentiary. From the judgment he appealed to this court, and filed his bond to supersede the judgment, and the other defendants in the case are the sureties on the bond. The cause was affirmed in this court on the fifteenth day of October, 1890, and a procedendo was on that day issued to the district court of Boone county, directing it to proceed in the same manner as if no appeal had been prosecuted in this court. The sheriff of Boone county, aided by a requisition from the governor of Iowa to the governor of Missouri, proceeded to that State, where the defendant Row was found; and he was taken by said sheriff, and delivered, on the twenty-fourth day of October, 1890, to the warden of the penitentiary at Ft. Madison, Iowa, in execution of the judgment of imprisonment against him. On the third day of November, 1890, at a term of the district court of Boone county, it appears that Joseph Row was called, and failed to appear, and thereupon the appearance bond was produced, and the sureties thereon were called, and failing to appear and to produce the said Joseph Row, the bond was declared forfeited. On the fifth day of November, 1890, the sureties on the bond appeared and filed a motion to set aside the default entered against them on the ground that, when it was entered, the said Row was in the penitentiary of the state in execution of the judgment. The district court overruled the motion, and the defendants appealed."

Granger, C. J. - The following is the record of the district court, declaring the forfeiture:

"State of Iowa v. Joseph Row. Be it remembered that on this third day of November, 1890, the above cause coming on for hearing on the motion of plaintiff for forfeiture of the appearance bond of the defendant Joseph Row, and, it appearing to the court that the judgment against the defendant Joseph Row has been affirmed by the supreme court of Iowa, and that the defendant Joseph Row was required by this court, that the sentence and judgment of said court might be executed and performed, and the said Joseph Row was called and failed to appear, and no person for him, and his appearance bond was produced, and said Joseph Row and the sureties on his bond, to wit, C. H. Ward, J. R. Hurlburt, A. H. Miles, and M. W. Ward, were called in open court, and failing to appear and to produce the said Joseph Row, the said appearance and undertaking to appear is hereby ordered, adjudged, and declared to be forfeited and in default." The undertaking of the bond is that "in case the said J. A. Row shall well and truly pay the said fine, or such part of it as the supreme court may direct, and if the said J. A. Row shall surrender himself in execution of the judgment and direction of the supreme court, and in all respects abide the orders and judgments of the supreme court, then this bond to be void; otherwise, to be and remain in

full force and effect." The default shown in the record is not a failure to make payment, but it is for want of the personal appearance of Joseph Row, "that the judgment of the court might be executed and performed."

The default as to the sureties is for not producing him. The situation, then, is this: The default was taken November 3, 1890. Nine days before that, the sheriff of Boone county had surrendered him at the penitentiary, and he was, at the time the default was taken, doing precisely the thing for which the district court desired his presence. He was called that he might be committed to the penitentiary. The court, through its processes, had already so committed him. It is not to be said, as a legal conclusion, that, had he not been imprisoned at the instance of the state, he would neither have appeared, nor his sureties produced him, when his appearance was called for. The state, by placing him in the penitentiary, had rendered it absolutely impossible for him to appear, or for the sureties on his bond to produce him. Under such circumstances there could be no default. It appeals, from an affidavit to the motion to set aside the default, that one of the sureties had sent an agent to Missouri to secure and return Row to the state, to avoid default on his bond, and Row was in the custody of such agent when the sheriff from Boone county arrived, and took him into custody, and afterwards delivered him at the penitentiary. It further appears that the sheriff was appointed as agent, under a requisition from the governor, at the request of one of the sureties on the bond.

It is said that the judgment was an imprisonment for five years, and payment of the costs of prosecution, and that the costs have not been paid. But the default is not for such a failure. The record makes no disclosures as to a default in the payment of costs. In our judgment the motion to set aside the default should have been sustained, and the order of the court overruling it is

Reversed.

State v. Helm.

Supreme Court of Iowa, 1894. 92 Iowa 540, 61 N. W. 246.

The defendant appealed from a judgment of conviction of murder in the second degree under an indictment for murder in the first degree.

Robinson, J. - .....

VI. The appellant asks that, in case of a reversal of the judgment of the district court, he be admitted to bail. The trial of the defendant on the charge of murder in the first degree, and his conviction of the crime of murder in the second degree, is, in

effect, an acquittal of the crime first named, and he can not again be placed on trial for it. State v. Tweedy, 11 Iowa, 352; State v. Clemons, 51 Iowa, 274, 1 N. W. Rep. 546. He now stands as one charged with the crime of murder in the second degree. Section 4107 of the Code provides that "all defendants are bailable, both before and after conviction, by sufficient surety, except for offenses heretofore punishable with death, under the laws of this state, where the proof is evident or the presumption great." The crime of murder in the second degree has not heretofore been punishable with death under the laws of this state; therefore the defendant is now bailable, unless he is within the provision of chapter 103 of the Acts of the Seventeenth General Assembly. That provides that "no defendant convicted of murder shall be admitted to bail." In Baldwin v. Westenhaver, 75 Iowa, 547, 39 N. W. Rep. 882, it was contended that one convicted of murder in the second degree was entitled to be admitted to bail while his appeal from the judgment of conviction was pending in this court; but it was held that such a case was covered by the provisions of chapter 103 quoted, and that bail could not be taken. It is true that in this case the defendant has been convicted of the crime of murder and he appears to be within the letter of the statute; but by this reversal of the judgment of the district court that conviction is set aside, and although the defendant now stands charged with the crime of murder in the second degree, yet he so stands as one unconvicted, and is entitled to the rights and privileges of a person in that condition. It follows that he is entitled to be admitted to bail, and the amount he is required to give we fix at the sum of five thousand dollars.

The judgment of the district court is Reversed.

State v. Meier.

Supreme Court of Iowa, 1895. 96 Iowa 375, 65 N. W. 316.

The defendant Hoffman appealed from a judgment for the plaintif in an action on an appeal bond.

Kinne, J. - The record discloses the following facts: That defendant Meier was indicted and convicted in the district court of Polk county, Iowa, for a liquor nuisance. He was sentenced to pay a fine of three hundred dollars, twenty-five dollars attorney's fees, and the costs, and was ordered imprisoned in the county jail of said county for one hundred and four days unless said fine, attorney's fees and costs were paid. Said Meier appealed from said judgment, and executed a bond, with the defendant and appellant Hoffman as surety. Said bond was conditioned as follows: "Now, therefore, in case the said Martin Meier shall well and truly pay said fine, or such part of it as the supreme court may direct, and if the said Martin Meier shall surrender himself in execution of the judgment and direction of the supreme court, and in all respects abide the orders and judgments of the supreme court, then this bond to be void; otherwise, to be and to remain in full force and effect."

On appeal to the supreme court the judgment below was affirmed. 88 Iowa, 747 (55 N. W. Rep. 521). Thereafter the appellant Hoffman turned the defendant Meier over to the custody of the sheriff of Polk county, who placed him in jail to serve out the sentence, where he remained until July 11, 1893, when he was released upon an order from the governor of the state suspending the sentence only "so far as the order of imprisonment is concerned." In this action a judgment was rendered against the surety, from which he prosecutes this appeal.

II. Appellant contends that, under the facts disclosed in record, the court erred in rendering a judgment against him; that he had, prior to the beginning of the proceeding to forfeit the bond, caused Meier to be surrendered in execution of the judgment. Furthermore, he claims that, by reason of the act of the governor the state is now estopped from recovering against him. Our statute provides: "After conviction upon an appeal to the supreme court, the defendant must be admitted to bail as follows: (1) If the appeal be from a judgment imposing a fine, upon the undertaking of bail that he will pay the same, or such part of it as the supreme court may direct, and in all respects abide the orders of the judgment of the supreme court upon the appeal. (2) If the appeal be from a judgment of imprisonment, upon the undertaking of bail that he will surrender himself in execution of the judgment and direction of the supreme court, and in all respects abide the orders and judgment of the supreme court upon the appeal. ....." Code, section 4587. Now, it is contended that, when the appellant placed Hoffman in charge of the sheriff, he thereby discharged his obligation under the bond. We do not so construe the law and the obligation entered into by Hoffman, as surety, for, by the express terms of his bond, he agreed, if the cause against Meier was affirmed, to "pay said fine, or such part of it as the supreme court may direct," and to see that Meier surrendered himself in execution of the judgment. His bond was to be void only on the happening of both conditions. It is said that the bond is given under the second division of the section above quoted. That is not true. That division refers to a case where bail is given on a judgment for imprisonment alone. The case at bar is one where there was a fine imposed, and a judgment for imprisonment until it was paid. Hence the bond was properly framed so as to cover the case presented. Code, section 4588. It is true in this case that the imprisonment is the means provided by the statute for coercing payment of the fine, but it is settled by a long line of authorities that the undergoing of imprisonment in such a case by the defendant, would not release him from the payment of the fine. State v. Jordan, 39 Iowa, 387; State v. Anwerda, 40 Iowa, 151; City of Keokuk v. Dressell, 47 Iowa, 597; Albertson, v. Kreichbaum, 65 Iowa, 18 (21 N. W. Rep. 178). The obligation of Hoffman was not in the alternative that he would pay the fine or deliver the defendant in the execution of judgment, but he expressly undertook to do both. Such being the case, Hoffman's liability was not satisfied by delivering the defendant to the sheriff, in execution of the judgment. We do not think this contention of the

appellant requires further discussion.

III. Lastly, it is urged that the state should be estopped from recovering against Hoffman because of the action of the governor. The order of suspension of the governor, as we have shown, related only to the imprisonment. Before its issuance, Hoffman had complied with one condition of the bond, - he had surrendered his principal to the sheriff. Now, the action of the governor in releasing Meier from further imprisonment in no way affected any right of Hoffman. He was not induced thereby to change his position. He did nothing by reason thereof. The essential elements of an estoppel are wanting. As we have seen, Hoffman's liability to pay the fine was absolute in case the judgment was affirmed and his principal failed to satisfy it. Therefore, any action which the executive might take touching the imprisonment could in nowise affect Hoffman's liability. We discover no error, and the judgment below is affirmed.

State v. Anderson.

Supreme Court of Iowa, 1903. 119 Iowa 711, 94 N. W. 208.

Weaver, J. - The defendant Walter Anderson was indicted for a felony, and his bail fixed at $1,500. Instead of giving bail in the usual form, defendant executed an individual bond for that amount; and his father, Walter F. Anderson, secured it by depositing $1500 of his own money in the hands of the clerk who receipted to him for it, and defendant was thereon released. On September 20, 1902, the defendant was convicted, and sentenced to a term of imprisonment in the penitentiary, and to pay the costs of the prosecution, taxed at $476. At the same time an order was executed fixing the amount of bail on appeal at $3,000. Within a few days thereafter an appeal was taken and perfected to this court. On September 30, 1902, Anderson, Sr, appeared in court, and, upon a showing that the son had surrendered himself in execution of the judgment against him, asked for a release and return of the deposit in the clerk's hands. This motion was opposed by the county attorney who claimed the money was liable to be applied to the payment of the judgment against the son for costs. On October 3, 1902, the son filed an appeal bond in the sum of $3,000, with Frank Reno as surety; and afterward on the same day the court made an order sustaining the application of Anderson, Sr., for the release of the money deposited by him, and directing the clerk to return it, as demanded. This order was complied with, and later on the same day the surety on the appeal bond surrendered the defendant Walter Anderson to the sheriff, who received the prisoner, and gave the surety a receipt accordingly. Thereupon Reno, upon showing of such surrender and receipt, moved the court for an exoneration of his bond, which application was followed by a motion upon the part of

the state for an order requiring the refunding of the $1,500 originally deposited by Anderson, Sr. In support of this motion, and in resistance to the motion to discharge the bond signed by Reno, it was alleged that the giving of the appeal bond was a fraudulent device adopted for the purpose of releasing the money. The trial court sustained the position taken by the state, and vacated the order releasing the deposit, directed the return of the money by Anderson, Sr., and ordered that the bond given by Reno be not exonerated until he returned or caused to be returned into the court the sum of $476, the amount of the costs adjudged against the prisoner. To this entry the court attached the following provision: "This order is not in any way intended to affect the defendant's right to have said money all returned to him upon going in good faith on appeal bond as required by law, and upon so doing he will be entitled thereto as provided by law." From these rulings and orders, Walter F. Anderson and Reno appeal.

The statute provides that, after an order admitting to bail, the defendant, instead of giving bail, may deposit with the clerk a sum of money equal to the bail required, and, upon delivery of the clerk's certificates of such deposit to the officer having him in custody, he shall be discharged. Code, section 5524. It is further provided that after such deposit has been made, and before any forfeiture thereof, the defendant may still furnish bail in the ordinary manner, and upon so doing the court shall order the clerk to refund the money so placed in his hands. Section 5526. By the next following section it is directed that where money has been deposited by defendant, if it remain on deposit at the time judgment is rendered against him, the clerk shall, under the direction of the court, apply the same in satisfaction of so much of the judgment as requires the payment of money, and refund the surplus, if any, to the defendant, "unless an appeal be taken to the Supreme Court and bail put in, in which case the deposit shall be returned to the defendant." Sections 5528 and 5529 provide a method by which the sureties upon a bail bond may "at any time before forfeiture of their undertaking surrender the defendant in their exoneration," and section 5530 allows a defendant who has deposited money in lieu of bail to surrender himself to the custody of the proper officer, and thus release the deposit:

The case chiefly relied upon by the appellee to sustain the order of the court below (State v. Owens, 112 Iowa, 407) is not controlling upon the questions here presented. Owens having been arrested for a misdemeanor, one Perry deposited money with the sheriff, in the nature of bail, but without authority of law. Later an indictment was returned, and an order made fixing bail. Owens applied to the court for an order reducing the amount of bail required, and proposing, in lieu thereof, to deposit the money then in the sheriff's hands. Accompanying the application was a written consent by Perry that the money be so used by Owens. The application was granted, and the money was deposited, and remained in the clerk's hands until after Owens had been convicted and a fine assessed. Thereafter Perry undertook to surrender the defendant into

custody, but did not take the proper statutory steps therefor. We there held that in view of the statute, and the order of the court made with Perry's express consent, the money should be considered as having been deposited by the defendant, and subjected to the payment of the judgment against him. Here, however, we have a deposit made by a third person; we have also an appeal from the judgment of conviction to this court, with bail in the amount required; and we have the release and return of the money deposited as the statute directs shall be done under such circumstances. Code, section 5527. In this condition of affairs, the surety upon the appeal, following the strict form of law, surrenders the defendant to the sheriff in execution of the judgment, and demands the exoneration of his bond. This right is denied him unless he complies with a condition imposed by the court, requiring him to return or cause to be returned into court the sum of $476, which fund may again be released and refunded upon "going in good faith on appeal bond as required by law." This order is sought to be justified upon the proposition that the surrender of the defendant so quickly after the bond was given, and after the order refunding the money was entered, clearly indicates that the bail was not furnished in "good faith", but for the mere purpose of securing the release of the money. But is this reason sufficient to sustain the refusal to exonerate the bond? The surety has, under the statute, an absolute right "at any time" before the forfeiture of the bond to surrender the defendant and be released. Code, section 5528. That right becomes perfect the moment the bond is accepted and the defendant discharged from custody, and continues until a forfeiture of the undertaking has been declared or the conditions of the bond have been performed. If we are to say that a surrender within an hour is proof of fraudulent intent, who shall say at what particular point of time it may be made without bearing the badge of bad faith? It is said that the admitted circumstances are such that we may assume the bond was given with a preconceived purpose to surrender the defendant. Such purpose, if it existed, is not necessarily fraudulent. It may often happen that bail is given to allow defendant brief respite for business or other reasons, and with the express intent to surrender him as soon as that end is accomplished, whether the interval be months, days, or hours, and such transaction would violate neither the letter nor the spirit of the law. The only purpose of the bond is to secure the production of the defendant in execution of the judgment from which he appeals, and if that condition be performed the law is satisfied, without regard to the time such obligation is in force.

But assuming that in the present instance the bond was given with no other purpose than to enable Walter F. Anderson to secure the release of the deposit, is the state in any manner "defrauded" by the subsequent surrender of the defendant? It is not questioned that the giving of the bond "in good faith" would have made the right to a refund of the money absolute, nor is it disputed that in such case Reno would have had the right at any time pending the appeal to this court to release himself from liability upon the bond by giving the defendant back into custody. Now, if he may terminate his liability at any time by pursuing a line of action

prescribed by the statute, it seems clear that the state suffers no legal injury or wrong because he avails himself of that right pursuant to a secret purpose existing in his mind at the time he signed the bond. In other words, so long as he does only that which the statute expressly authorizes him to do, it is not within the province of the court to make the motive which inspires his act a reason for denying him the right which such statute gives. The force of these suggestions is seen when we note the provision in the court's order by which, if Reno pays the $476 into court, it may again be released by giving another bond "in good faith." Let us suppose these terms are accepted, and another bond given in the utmost good faith, and thereafter the surety, having good reason to believe the defendant is liable to abscond, surrenders him as provided by law; certainly it cannot be said, in the absence of a statute requiring it, that, in addition to the surrender, he must also restore the deposit, as a condition of the exoneration of his bond. The undertaking of a surety upon an appeal from a conviction of a felony is that "the defendant twill surrender himself in execution of the judgment and direction of the Supreme Court, and in all respects abide the orders and judgment of the Supreme Court upon the appeal." He does not undertake to pay the costs of prosecution in either court. If the judgment appealed from is affirmed, and the defendant is surrendered by the surety, or voluntarily surrenders himself, in execution of the judgment against him, and of the orders of the Supreme Court, the bond has spent its force and should be discharged. A surrender made in advance of the judgment upon appeal has precisely the same effect. The surety thereby does all he undertook or promised to do, and his exoneration cannot be denied as a means of compelling him to perform an act or duty not "nominated in the bond."

Upon the appeal of Walter F. Anderson, it is argued by him that in no event is a deposit made in liew of bail liable to the subjected to the payment of the costs. The Owens Case does not involve this question. The order there appealed from applied the money to payment of the fine and costs; and on the submission in this court it was not urged, nor did we consider, whether payment of costs, as distinguished from the fine, could be thus enforced. Neither is such question so essential to a disposition of the present appeal as to now require us to decide it. The appearance of Walter F. Anderson in the proceeding in the district court was somewhat analogous to that of an intervener asking the restoration to him of the money in the hands of the clerk. Assuming (for the purposes of this case only) that, if no bail had been given on the appeal, this money could have been applied to the payment of costs, it is not open to question that, upon such bail being furnished, the defendant or his father was entitled to demand a release of the deposit. The order was made accordingly, and Anderson, Sr., having received his money, his connection with the proceedings appears to have been terminated. At least, the record does not indicate that he was thereafter in court, or was brought within its jurisdiction by process or notice of any kind. But waiving any

question of jurisdiction, we see no way to uphold the judgment by which the order for the release of the deposit was set aside, and its return commanded. If the statute provides, as we have seen it does, that the giving of bail upon an appeal has the effect to release the deposit, it would not be a fraud for the father to interest himself in procuring the bail, in order that his money might be restored to his possession. There is nothing in the record, however, to indicate that this bond was procured by his solicitation, except the circumstances of the speedy surrender of the defendant after the money was released. The order of release was a matter of right the moment after the bail was accepted. There is no objection raised that the bill bond was not a valid undertaking made in due form of law, or, if forfeited, could not have been enforced; and if valid and enforceable, as other appeal bonds, we see no reason why all the statutory incidents and rights attaching to or flowing from such undertakings are not available here. It may be that the statute which by one section allows the defendant to release a money deposit by giving bail, and by another section allows the surety upon the bail bond to relieve himself from liability by surrender of his principal at any time before forfeiture of the bond, opens the way for the latter to rescue his money from the hazard of subjection to the claims of the state. This objection goes to the wisdom or policy of the statute; and not to its interpretation. If the statute confers a right upon the performance of certain conditions, it is not our province to deny or nullify that right because it leads to results which we may believe were not foreseen by the Legislature.

.....

Reversed.

(The court also mentioned the fact that the statute does not authorize the deposit of money by third persons in substitute of bail).

Habeas Corpus.

The remedy of one who has been improperly denied the right of bail (Murphy v. McMillan (1882) 59 Iowa 595, 13 N. W. 654 (dictum)) or whose bail has been fixed in an excessive sum, is by writ of habeas corpus. Likewise, one who has been arrested and held subject to bail fixed in a moderate sum, but under such circumstances that there is no color of authority for his detention, has this writ for his relief. For these reasons it is not out of place to consider this writ at this point although its use is not limited to the steps available to a defendant prior to trial.

Habeas corpus is a high prerogative writ whose purpose is to secure the liberation of one who is imprisoned without just cause. Its development is intimately bound up in the struggle of the

English speaking race for free institutions. It was one of the great rights contained in Magna Charta. But as the writ was not given the force which was deemed necessary for the adequate protection of the people, the Habeas Corpus Act was passed in 1679 (31 Car. II), which made the great writ properly effective. Both in The Constitution (Article I, section 9, (2)) and in the Constitution of Iowa (Article 1, section 13) it is provided that the writ of habeas corpus shall not be suspended unless in case or rebellion or invasion, the public safety may require it.

The application for this writ is by petition (4417) to the "supreme, district or superior court, or any judge of either of those courts" (4419)" most convenient in point of distance to the applicant" (Supp. '13), § 4420), which means the person in confinement (Thompson v. Oglesby, (1876) 42 Iowa 598) although the petition may be sworn to and presented either by the person confined, or by someone on his behalf (4418). "When the writ is allowed by a court, it must be issued by the clerk, but when by a judge, he must issue it himself, subscribing his name thereto" (4424, and see 4423 for the form). "The writ may be served by the sheriff, or by any other person appointed in writing for that purpose by the court or judge" (4428), in any part of the state (4419), "by leaving the original writ with the defendant, and preserving a copy thereof on which to make the return of service" (4429, see also 4430 to 4441 inclusive). Thereupon" the defendant must appear at the proper time and answer the petition "(4442, and see 4438 to 4440 inclusive) and "must also produce the body of the plaintiff, or show good cause for not doing so" (4443, and see 4437 and 4439).

"The petition for the writ of habeas corpus must state:

1. That the person in whose behalf it is sought is restrained of his liberty, and the person by whom and the place where he is so restrained, mentioning the names of the parties, if known, and if unknown describing them with as much particularity as practicable;

2. The cause or pretense of such restraint, according to the best information of the applicant; and if by virtue of any legal process, a copy thereof must be annexed, or a satisfactory reason given for its absence;

3. That the restraint is illegal, and wherein;

4. That the legality of the imprisonment has not already been adjudged upon a prior proceeding of the same character, to the best knowledge and belief of the applicant;

5. Whether application for the writ has been before made to and refused by any court or judge, and if so, a copy of the petition in that case must be attached, with the reasons for the refusal, or satisfactory reasons given for the failure to do so, (4417). The defendant in his answer must state whether he then has, or at

any time has had the plaintiff under his control and restraint, and if so the cause thereof" (4446, and see 4442). "The plaintiff may demur or reply to the defendant's answer ..... and all issues joined therein shall be tried by the judge or court" (4449, and see 4450), and "if no sufficient legal cause of detention is shown, the plaintiff must be discharged" (4452). The applicant may fail to gain his liberty either because (1) the court or judge refuses to allow the writ because "from the showing of the petitioner, the plaintiff would not be entitled to any relief" (4421); or (2) because the writ having been allowed and the issues tried by the court or judge, the commitment was found to be regular; or (3) because the court or judge is satisfied that "although the commitment of the plaintiff may have been irregular" yet the plaintiff "ought to be held to bail, or committed" (4453).

Orr v. Jackson, Judge.

Supreme Court of Iowa, 1910. 149 Iowa 641, 128 N. W. 598.

Evans, J. - This case is one of a series of successive proceedings each of which involved the same and only question. In June, 1909, one Otto Seidlitz upon information of the plaintiff herein, E. L. Orr, was adjudged by the defendant judge to be guilty of contempt for violating a liquor injunction, and was adjudged to pay a fine and to be imprisoned for three months. Seidlitz sued out a writ of certiorari in the nature of appeal to this court and obtained here a review of such order. The result of such review here was that the certiorari proceedings were dismissed and the judgment of the lower court affirmed. Seidlitz v. Jackson, Judge, (Iowa) 125 N. W. 230. On June 20, 1910, a procedendo issued from this court, and Seidlitz was taken into custody by the sheriff of Muscatine County, in execution of the judgment against him. On the same day he sued out a writ of habeas corpus before the same judge, challenging again the legality of his imprisonment. In accordance with statutory procedure in such cases, he was immediately brought before the judge by the sheriff in whose custody he was and a hearing was had on his petition. On such hearing, the defendant judge dismissed the habeas corpus proceeding and remanded back the petitioner, Seidlitz, to the custody of the sheriff who was named as defendant in such proceeding. At the same time, however, the defendant judge ordered that the petitioner be admitted to bail pending his appeal to the Supreme Court from the order of dismissal of his habeas corpus petition. Bail being given forthwith, the petitioner was released from custody. The plaintiff herein challenge the legality of what part of the order of the defendant judge wherein Seidlitz was admitted to bail pending appeal to this court.

I. It is urged by the defendant that the plaintiff is not a party in interest and has no standing in this court, and that this proceeding should therefore be dismissed. In Hemmer v. Bonson,

139 Iowa, 210, we held adversely to this contention. It is also urged that certiorari will not lie because there is a speedy and adequatic remedy by appeal. This position is not tenable. The plaintiff herein was not a party to the habeas corpus proceeding in such a sense that he could appeal. Neither could he compel the defendant sheriff to appeal. It is made to appear, also, that on November 7, 1910, the defendant sheriff did in fact serve notice of cross appeal in the main case. Such appeal can not be heard before the January, 1911, term. It is manifest that no practical result can be obtained by such cross appeal. When the appeal in the main case is determined the order admitting Seidlitz to bail will have run its full course. Nothing but a moot question will remain in relation thereto. We are constrained to hold, therefore, that the question of the validity of the order complained of is properly raised by this proceeding.

II. This brings us to the main question. Was there any warrant under the statute for the order admitting Seidlitz to bail pending appeal by him to this court from the order of dismissal of his petition. The habeas corpus proceeding was not a criminal proceeding. State v. Collins, 54 Iowa, 441. And, if it were, Seidlitz was plaintiff therein, and not defendant. The statutes in relation to bail have no application to such a case. The purpose of bail on appeal in a criminal case is only to suspend the execution of judgment pending the appeal. There was no such function to be performed in the case under consideration. The effect of the order for bail was not to maintain the status quo. On the contrary, it operated affirmatively to grant such petitioner the very relief which was denied him in the order of dismissal. In State v. Kirkpatrick, 54 Iowa, 373, it was held that a habeas corpus proceeding was intended to be summary, and that when a court granted to the petitioner therein affirmative relief, even the defendant could not maintain the status quo nor suspend the judgment by a supersedeas bond. All the more reason is there for saying that where a writ of habeas corpus is dismissed upon a hearing, the petitioner therefore may not obtain indirectly by means of a bond the affirmative relief which he sought by means of his writ. If we should concede that he might maintain the status quo, he had no nee of bail or bond for that purpose. When the writ was sued out he wa in the custody of the sheriff. When a hearing was had upon his petition he was still in the custody of the sheriff. Code, section 4455, provides: "Until the sufficiency of the cause of restraint is determined, the defendant may retain the plaintiff in his custody, and may use all necessary and proper means for that purpose." It rested with the court upon such hearing to say whether such custody should be interfered with. The court refused to discharge him from such custody. The effect of its order was to leave the petitioner where it found him. The petitioner had his remedy by appeal but he had no right to nullify the summary character of the habeas corpus proceeding to which he had resorted. To hold otherwise would be to play with the process of the court upon final judgment. The right to a writ of habeas corpus to test the legality of an imprisonment is almost absolute in the first instance. The purpose of such a writ is very beneficent. But the proceeding is in its essence

summary, and is not intended to overturn due course of legal procedure. If it could be used to work indefinite delay in the execution of final judgments of punishment, the proceeding itself would become intolerable. Code, section 4451, expressly forbids its use to "question the correctness of the action .....of a court or judge when lawfully acting within the scope of their authority." This was doubtless the ground upon which the habeas corpus proceeding was dismissed. It is no less a reason why the order for bail should not have been entered.

Such order admitting Seidlitz to bail must, therefore, be annulled and reversed. Defendant's motion to dismiss this proceeding was ordered submitted with the case. What we have here said is necessarily decisive of such motion."

Reversed.

Springstein v. Sanders.

Supreme Court of Iowa, 1918. 182 Iowa 658.

The plaintiff's petition for a writ of habeas corpus having been denied, he appealed.

Weaver, J. - The plaintiff's petition, which bears date of January 11, 1917, discloses that, on March 21, 1913, in the district court of Dickinson County, Iowa, he was convicted of the crime of rape, committed upon one Ora Lombard, and sentenced to confinement in the penitentiary at Fort Madison; that a warrant of commitment was issued by said court to carry the sentence into effect; and that, under and by virtue thereof, plaintiff has since been kept and restrained in the penitentiary, of which the respondent herein is warden. No complaint is made that plaintiff was not indicted and tried in the manner required by law, or that said district court did not act strictly within its jurisdiction in entering said judgment, or in issuing said warrant of commitment; but the sole ground upon which he demands his release upon habeas corpus is that, although convicted in due form of law, he is in fact innocent of the crime charged against him, and that his conviction was obtained by intimidation and perjury. That we may not err in the statement of his claim, we quote literally from the petition as follows:

"That said restraint is illegal, and wherein it is illegal is as follows: (1) Said conviction was procured by intimidation and perjury, as shown by the affidavit of Ora Lombard, the prosecuting witness, and her mother, hereto attached, marked Exhibit B and made part hereof; and plaintiff is in fact innocent of this alleged crime. That, in the trial of said cause, there was no question as

to the corpus delicti; but there was no evidence connecting the said Springstein with the crime, except the testimony of said Ora Lombard, then aged fourteen years, and opportunity arising from the fact that he boarded in her family, and on some few occasions were alone together. She now, however, is in her eighteenth year, and endowed with conscience, and being so, she made said affidavit, at a date more than three years after said verdict and judgment were rendered, in which she states that her testimony was false, and was given by intimidation, under a threat that she would be sent to the reform school, if she did not testify that said Springstein had carnal knowledge of her. Your petition further states that said testimony at the trial was false, and was given by intimidation, and the verdict and judgment were the result of said intimidation, and therefore void, or at least voidable in habeas corpus; and there is no way by due legal process that your petitioner can avail himself of this newly discovered evidence and intimidation and duress, except by the writ of habeas corpus."

These allegations are supported by an affidavit as follows:

"EXHIBIT B."

"State of Iowa, Calhoun County, ss.

"Ora Lombard and her mother, Mrs. Lillie Lombard, now residing at Rockwell City in said county, being first duly sworn state as follows:

The said Ora Lombard states J. C. Springstein, who was sentenced about March 1st, 1913, from Dickinson County District Court of Iowa, for carnal knowledge of herself, is not guilty of said crime. She states that said Springstein never had carnal knowledge of her, and she gave her testimony at the trial against him through duress under threats and fear of being sent to the reform school if she did not testify against him.

"Mrs. Lillie Lombard states that she does not believe said Springstein is guilty of said crime and that she never observed any improper conduct by him." (Duly signed and sworn to).

The foregoing is the entire showing on which counsel for plaintiff rests his case. In his brief, he argues that illegality in a conviction on a criminal charge must present itself in one of three phases; (1) Patent illeglaity, - that is, errors apparent in the record, which may be reviewed on appeal; (2) quasi patent illegality, not appearing on the record, but known to the accused in time for presentation in a motion for new trial; and (3) latent illegality, the facts of which were unknown to the accused in time to direct the court's attention thereto on the trial, or on motion for new trial. Illegality of the latter kind, he says, "goes to the question of the jurisdiction of the court to render any judgment whatever. For the principle of estoppel cannot apply where the facts are not known. And hence the illegality can never ripen

into legality, and the judgment is consequently void ab initio." This seems to mean - if, indeed, it means anything - that, if a judgment of a court of general jurisdiction, duly rendered in accordance with all the forms and requirements of law, shall result in hardship or injustice to the party against whom it is rendered, - a hardship or injustice which might have been avoided, and certain hidden or unknown facts been revealed at the trial of the case, - the discovery of such evidence at any time in the near or remote future is sufficient ground for declaring the judgment void ab initi We are cited to no authorities in support of this proposition, which is novel, if not startling. Counsel mentions Lockard v. Clark, 166 Iowa 556, and Lockard v. Sanders, 167 Iowa 533, as having some bearing upon it; but a careful reading of those cases discloses no similarity with the one at bar; or, if the principles there approved have any application to the facts here presented, they are to be regarded as opposed to the conclusion which counsel asks at our hands. Aside from these cases, the brief cites no authority, and counsel concedes his inability to find any on which he can rely. Failing in this, he calmly casts all responsibility upon the court, as follows:

"If this statement is fallacious, the court will see it. As at present advised, the belief of the writer is that it is a true analysis; and he will await the court's decision with great interest, to see if it be so, wherein he missed the truth. We claim that the common law, as modified by our Constitution and statutes, is the law of the land. It is the stream 'pure and clear as crystal' pictured in the Apocalypse, as proceeding out of the throne of God, and the Golden Rule is of its essence and deep channel and current."

It may be true, and indeed is true, that, if an innocent person be convicted of crime, and, after the time for appeal or for review of his case is long passed, convincing evidence of his innocence is discovered, there ought to be some way in which he may be relieved from unjust punishment, and the stigma of his conviction removed, other than by the expedient of an executive pardon for an offense which he has never committed. In an ideal state of the law, such remedy would necessarily have a place; but nothing is better established than fact, in the law as we have it, no such remedy is provided. Counsel practically concedes that habeas corpus has never been recognized as a means to that desired end; but he makes this effort experimentally, rather than otherwise, in the hope that the court may be induced to establish a new and revolutionary precedent. We can only say that we are not yet ready to make so radical a venture.

The plaintiff's case is without legal merit, and his petition was properly dismissed. - Affirmed.

Motions and Petitions.

(a) To Set Aside the Indictment.

If, under common law procedure, it could be seen from the face of the indictment that it was insufficient as a matter of law a proper mode of attack was by a motion to quash the indictment. This motion was also available to test objections to the mode of selecting, summoning or impaneling the grand jury, and also objections as to the competency and qualifications of the grand jurors if such objections had not been waived by a failure to challenge. If an unauthorized person had been present before the grand jury or if the indictment had not been properly found, indorsed, presented and filed, or if it had been altered without authorization from the grand jury, this motion would be sustained. It was also used to attack the indictment on the ground of duplicity or of misjoinder of counts. There was a rule in a few states that this motion was limited to the attack of such defects only if they appeared on the face of the indictment or on the face of the record, but his limitation was not generally recognized.

As will be shown in the next section, whenever all the facts stated in the indictment, if true, would not authorize a conviction of the defendant on the offense charged, he may demur to the indictment. From this it is obvious that the insufficiency of the indictment might be attacked either by a motion to quash or by a demurrer (or also, as will be shown hereafter, by a motion in arrest of judgment, or by an appeal or a writ of error). Under the Code the grounds upon which a "motion to set aside the indictment" may be made, and those that will support a demurrer by the defendant are specifically set out (5319 and 5328) and are not intended to overlap, although they are not expressly made mutually exclusive. (Compare the provisions which follow with those that are given under the next section).

If we accept the word "indorse" at its literal meaning, and say that all indorsements are, figuratively at least, on the back of the instrument, then we may say that under the Code, objections to substantial defects appearing on the face of the indictments are to be taken by demurrer, while objections to defects in the grand jury itself or in the finding and presentation of the indictment, including defects appearing on the "back" of the indictment are raised by the motion to set aside.

"The motion to set aside the indictment can be made, before a plea is entered by the defendant, on one or more of the following grounds, ...

1. When it is not indorsed 'a true bill' and the indorsment signed by the foreman of the grand jury as prescribed by this code;

2. When the names of all witnesses examined before the grand jury are not indorsed thereon; when the minutes of the evidence of the witnesses examined before the grand jury are not returned therewith;

3. When it has not been presented and marked 'filed(as prescribed by this code;

4. When any person other than the grand jurors was present before the grand jury when the question was taken upon the finding of the indictment, or when any person other than the grand jurors was present before the grand jury during the investigation of the charge, except as required or permitted by law;

5. That the grand jury were not selected, drawn, summoned, impaneled or sworn as prescribed by law"(5319).

If any of these five grounds exist the motion to set aside must be sustained except:- that it will not be sustained if made on the second ground, if the indorsement of the names of witnesses is corrected to correspond with the minutes, by the county attorney or by the clerk under the direction of the court (5320); and it will not be sustained if made on the fifth ground by a defendant who was held to answer before indictment (5321; "the objection could have been raised only by challenge to the panel" if there has been an opportunity to challenge, State v. Hart (1870), 29 Iowa 268; as to the challenge to the panel see 5241).

For obvious reasons the grounds for the motion to set aside an indictment would not apply to an information for an indictable offense, and accordingly it is provided that before a plea is entered," a motion to set aside the information may be made on one or more of the following grounds:

1. When it is not indorsed 'a true information', and the indorsement signed by the county attorney.

2. When the minutes of evidence have not been filed with the information.

3. When the names of the witnesses named in such minutes of evidence are not indorsed on the information.

4. When the information has not been verified or filed in the manner herein required.

5. When the accused has not, prior to the filing of the information, been held to the grand jury for the offense charged, or the information has not been approved, as required" (Supp. '13, § 5239-m.) Such motion shall be sustained if any such grounds exist, except that it will not be granted if the grounds fall with the first four divisions and are corrected within such time as the court may order (Supp. '13 § 5239m).

If the motion is granted the court must order the defendant to be discharged or his bail exonerated or cash deposit in lieu of bail returned, as the fact may require, unless the court direct that the case be resubmitted to the same or another grand jury (5325); but in no case does the granting of such a motion operate as a bar to a future prosecution for the same offense (5326).

State v. Will.

Supreme Court of Iowa 1896. 97 Iowa 58, 65 N. W. 1010.

The defendant appealed from a conviction of maintaining a liquor nuisance.

Kinne, J.- I. The indictment charges the defendant with the crime of nuisance, and is in the usual form. Defendant moved to set it aside for the following reasons: Because it was found upon the compulsory order and direction of the judge of the district court, that after the grand jury had reported that they had no further business, and asked to be discharged, the court ordered them to return to their jury room; and that the judge of said court afterwards went to said jury room, without being requested so to do by the grand jury, and directed said grand jury to find said indictment; and the same was thus found under the duress and compulsion of the court, and contrary to the opinion and wishes of said grand jury. The judge, Hon. N. B. Hyatt, when the grand jury asked to be discharged, said to them: "I am compelled to say to you from what I have heard, which I must believe to be true, as related to the condition of things in your county, that you have not discharged your duty, - that there is other business that you ought to attend to. I cannot discharge you, as grand jurors, until you have made some effort to bring the persons who are guilty of violation of the law for the suppression of intemperance to justice. I charge you to return again to your grand jury room, and make an effort to procure witnesses and prosecute the parties who have been guilty of violating that law in this county. I feel sure that abundance of witnesses can be obtained and abundant evidence procured that will warrant you in returning indictments against the various parties in this county. I cannot believe that you, as intelligent and good citizens of this county, can justify yourselves in going to your homes without making an attempt to bring the guilty parties to justice. You will retire, and proceed to discharge your duties in accordance with the instruction of the court." The motion to set aside the indictment was overruled, and this action of the court is assigned as error. The law provides that, when the grand jury is impaneled and sworn, it may be charged by the court that in doing so the court shall give them such information as it may deem proper as to the nature of their duties,

and any charges for public offenses returned to the court, or likely to come before the grand jury. It is further provided, "And it is hereby made the duty of the court to specially give in charge to the grand jury, the provisions of the law .....providing for the suppression of intemperance." Code, section 4270. Section 4271 provides that the court shall discharge the grand jury on the completion of its business. It is clear that whether or not the grand jury has completed its work is a matter not entirely to be determined by that body, but its decision in that respect is always subject to the judgment of the court. The court may at any time during the sitting of the grand jury, and before its final discharge, give that body further charges as to matters arising since the first charge was given, and as to matters concerning which they should be charged, and which may have been overlooked by the court in giving the original charge; and it may be within the province of the court, in a proper case, to call the attention of the grand jury generally to its duty with reference to the laws touching the suppression of intemperance, even though that was done when the original charge was given. This is especially true if it appears to the court that in that respect the grand jury has not investigated to ascertain whether or not such law has been violated. An examination of the language used by the court (Judge N. B. Hyatt) shows that it did not call the attention of the grand jury to the supposed violation of the law by any particular person. From the tenor of the court's remarks it would seem that he must have thought that the grand jury had given the matter of the violation of this law no attention whatever. Under such circumstances, it was within his province, if not his duty, under the provisions of the law, to call the attention of the grand jury to the necessity for investigating supposed violations of this law. The real question is, did the court, in what he said, exceed the proper limits? The utmost effect of the language used was to tell the jury that the court believed they could find evidence which would warrant them in returning indictments for the violation of the liquor laws. In so far as the charge directed the grand jury to investigate the matter of violation of the law, it was proper; but, in so far as it undertook to tell the jury that there was evidence warranting them in indicting parties for violation of this law, it was, in our judgment, improper and unwarranted. As to that, the grand jury alone were the judges, and the court had no right to invade their province in that respect. State v. Turlington, 102 Mo. 642 (15 S. W Rep. 141); 2 Hale P. C. 161; Clair v. State (Neb.) (59 N. W. Rep. 120).

II. It appears from the affidavits of three of the grand jurors, which are not disputed, that the presiding judge, Hyatt, went into the room of the grand jury, and while they were in session and personally urged the indictment of parties for violating the liquor laws. One grand juror swears that the judge said to them "that he knew there was evidence enought to indict Smallpage Bros. and F. J. Will (the defendant herein), and said, 'You have got to indict them.'" Another swears that the judge told them, "There is not a drug store in Wright county that was not violating the law, and liable to be indicted," that he gave them "positive orders to

indict all such places." Another swears that he told them "that the permits themselves were sufficient evidence on which to base an indictment." All of these grand jurors swear that the indictment in this case was found, not of their own free will and upon their own judgment, but upon the express orders of the judge, given as heretofore stated. For the reasons heretofore stated, defendant moved to set aside the indictment. The motion was overruled, an exception taken, and error properly assigned.

The attorney general insists that these affidavits are not competent to impeach the record, proceedings, or findings of the grand jury; that, when the indictment is returned and filed, it becomes a record (Code, section 4294), which cannot thus be assailed or impeached. He also insists that, upon a motion to set aside an indictment, the character of the evidence upon which the grand jury acted cannot be inquired into. We proceed to a consideration of the cases relied upon by the attorney general: In State v. Gibbs, 39 Iowa, 321, it was held that the fact that an indictment was presented and filed after the adjournment of court, and that the grand jurors did not assent to the finding of an indictment, cannot be shown by affidavits of grand jurors in support of a motion to set the indictment aside. In State v. Davis, 41 Iowa, 315, it was proposed to prove by a grand juror that the grand jury intended to, and did in fact, vote only to find an indictment for manslaughter, and refused to find an indictment for murder, and such evidence was held properly rejected. The court said: "After an indictment has been presented to the court by the grand jury, filed, and become a matter of record, it is not competent for those who found the indictment to testify that they did not vote to find the bill, or to explain how they did vote, or what they intended to find." State v. Little, 42 Iowa, 52, holds that, when the minutes returned with an indictment are filed, they cannot be contradicted by affidavits to the effect that they do not contain all the material evidence given before the grand jury. In State v. Fowler, 52 Iowa, 104 (2 N. W. Rep. 983), it was held that upon a motion to set aside an indictment the court could not inquire into the character of the evidence upon which the grand jury acted. In State v. Smith, 74 Iowa, 584 (38 N. W. Rep. 492), it was held that an indictment could not be assailed by motion on the ground that it was found upon incompetent or insufficient testimony. We do not think that any of the cited cases are controlling as to the question now before us. One of the statutory grounds of a motion to set aside an indictment is:"(4) When any person, other than the grand jurors, was present before the grand jury when the question was taken upon the finding of the indictment, or when any person, other than the grand jurors, was present before the grand jury during the investigation of the charge, except as required or permitted by law." Code, section 4337, subd. 4. Now, the cited cases go to the extent of holding that a grand juror's affidavit cannot be received to show that he did not assent to the finding of an indictment, or that he intended to, or in fact did, vote for an offense other than that stated in the indictment; or to explain his vote, or to contradict the minutes of the grand jury, or as to the character of the evidence upon which the indictment was found, or that it was found upon insufficient or incompetent

testimony. The question we have to deal with is, may the affidavit of a grand juror be received to show that the judge of the court, at his own instance, visited the grand jury, while in session and deliberating upon a case, and insisted and directed that that body should indict a party for a certain crime, against whom an indictment was thereafter returned for that crime, and may such affidavit be received to show that the indictment was found under such express direction of the court? It is said that our statute provides that the members of the grand jury shall keep secret "the proceedings of that body and the testimony given before them except as hereinafter required." Code, section 4284. Manifestly, it was not the intent of this section to require the grand jury to preserve secret the fact that one not authorized by law had been present when they were considering the question of finding an indictment against a party. Such a construction of the statute would tend to encourage the very acts which it expressly prohibits, viz., the presence and influence of unauthorized persons while a charge is under investigation. In State v. Kimball, 29 Iowa, 267, it was held that the question of the presence of an unauthorized person in the grand jury room while witnesses were being examined, and the grand jury were deliberating upon the defendant's case, must be raised by motion to set aside the indictment. In Ex parte Schmidt, 71 Cal. 212 (12 Pac. Rep. 55), it was held that a member of the grand jury might be examined as to whether any person was examined as a witness before the grand jury whose name was not indorsed on the indictment. The court said: "By section 925 [Pen. Code] no person, except the district attorney and witness under examination, are permitted to be present at the sessions of the grand jury. If, therefore, neither the members of the grand jury nor the district attorney could be called upon to state whether any witnesses were examined other than those whose names have been inserted or indorsed, a barren right to move to dismiss is given, without the power to ascertain whether or not the statute has been complied with," It may be that these cases go further than our own, in some respects; but they recognize the necessity of permitting the establishment, of certain facts by the testimony of grand jurors, without which the right of a defendant to move to quash an indictment because of the presence of unauthorized persons in the grand jury room during its deliberations, would be a barren right. In State v. Miller, 95 Iowa, 368 (64 N. W. Rep. 288), after referring to the provisions of the statute it was said: "These provisions authorize the practice, common in criminal cases, of showing occurrences in the jury room by affidavits; and it was competent, under them, to show by that means the part which the clerk of the grand jury took in the examination of witnesses." The affidavit in that case was made by a member of the grand jury. If, in a case like that, an affidavit of a grand juror is receivable to show whether or not the clerk violated the duty case upon him by law, we can see no good reason why such affidavits are not competent to show that the judge of the court - a person not authorized by statute - visited the jury room during their deliberations, and directed the jury what action they should take with reference to indicting the defendant. We hold, then, that the affidavits of the jurors were competent to show the facts recited in them.

Now, as we have seen under the law, the presiding judge had no right whatever to be in the jury room during their deliberations, he not having been there in the capacity of a witness. The fact that he was there under the circumstances disclosed, is, by law, made a ground for setting aside the indictment. Add to that the fact, undisputed, that he directed the jury to indict this defendant and we have a case where not only the province of the grand jury was improperly invaded, but the discretion and judgment wisely vested by law in that body is swept away by the positive direction of the judge of the court, and the will of one man is substituted for and in place of the judgment of the grand jury. Under the circumstances disclosed in this case, the defendant was deprived of the right of having his case examined and passed upon by an unprejudiced grand jury, uninfluenced by the presence of unauthorized persons while that body was deliberating thereon. In Clair v. State 59 N. W. Rep. (Neb.) 120, in speaking of the invasion of the province of the grand jury by the court, it is said: "We are constrained, after a careful consideration of the subject, to regard the objections made to the charge, so far as it assumes the commission of the crime of bribery, as a merited criticism. While doubtless intended as an admonition to the jurors with respect to their duty, it cannot be construed otherwise than an invasion of their province which amounts to an abuse of discretion. The finding or presentment of the grand jury of necessity includes two elements, to wit: First, the corpus delicti; and second, a finding that the offense named was committed by the person charged. Both facts must be found by the jury, and cannot be dictated by the judge." The above language was used with reference to the charge of the court, and applies with much greater force to a case like that at bar, when the judge goes to the grand jury room and directs the finding of an indictment. Sir Matthew Hale said: "The privilege of an Englishman is that his life shall not be drawn in danger without due presentment or indictment, and this would be but a slender screen or safeguard if every justice of the peace or commissioner of oyer and terminer or gaol delivery may make the grand jury present what he pleases, or otherwise fine them," 2 Hale, P. C. 161. But we need not dwell further upon this matter. To countenance such a proceeding would be to strike a fatal blow to the grand jury system, would effectually deprive that body of the exclusive discretion which the law has reposed in them, and instead of leaving them an independent body, charged with the investigation of crime, and the due presentment of those who, from the evidence before them, they should deem to be guilty parties, would make them the mere servants of the presiding judge, to register his will regardless of their own judgment. Under no view of the case can the action of the judge be sustained. The motion to quash the indictment should have been sustained. Under this view of the case, it would be neither profitable nor proper to consider the alleged errors arising upon the trial. Reversed.

State v. Baughman.

Supreme Court of Iowa, 1900. 111 Iowa 71, 82 N. W. 452.

Having been convicted of the crime of having committed incest with his sister, the defendant appealed.

Ladd, J. - Though not held to answer on preliminary examination, the defendant moved to set aside the indictment because a member of the grand jury returning it had previously formed and expressed an unqualified opinion of his guilt. This, a cause for challenge by one held to answer (section 5243, Code), is not recognized by the statute as a sufficient reason for setting aside an indictment. Section 5319 of the Code enumerates five grounds, numbering them, on one or more of which the motion to set aside must be sustained. The following sections provide for obviating this by correcting an omission to indorse the names of witnesses, and section 5321 denies the fifth ground - objection to the panel - to one held to answer. In previous sections (chapter 13, title 25) the right to the exercise of challenges to the panel and to individual jurors is given a person held on preliminary examination. Had the lawmakers intended the challenge to individual jurors to be available to one not bound over, this would, doubtless, have been mentioned among the grounds stated for setting an indictment aside. Specifying particularly what might be the basis of such a motion, in view of prior provisions, and the subsequent reference to corrections and an exception, clearly indicates the purpose of the legislature that the grounds enumerated should be exclusive of all others. Going back of indictments for facts to abate or quash them - usually because of disqualifications or misconduct of grand jurors - formerly led to great delays and abuses; sometimes to the miscarriage of justice. Our statutes were enacted to simplify the practice as far as practicable, and do away with merely dilatory pleas. To this end objections which may be interposed, and the time, has been definitely fixed. Thus, in State v. Russell, 90 Iowa, 569, the motion to set aside, for that a brother of the injured party was a member of the panel was overruled; this not being one of the statutory grounds. The same ruling has been repeatedly made where the insufficiency or incompetency of evidence before the grand jury was the cause assigned. State v. Tucker, 20 Iowa, 508; State v. Morris, 36 Iowa, 272; State v. Fowler, 52 Iowa, 103; State v. Smith, 74 Iowa, 584. The supreme court of Oregon was held that only the enumerated grounds were available for such a motion. State v. Whitney, 7 Or. 386. That of South Dakota has reached the same conclusion. State v. Bank, 3 S. D. 52 (51 N. W. Rep. 338). See, contra, State v. Brecht, 41 Minn. 52 (42 N. W. Rep. 603). Whether the court, in furtherance of justice, has the inherent power to set aside an indictment when procured through exceptional means, not referred to in this title, - as through misconduct of the judge, mentioned in State v. Will, 97 Iowa, 58, - ought not to be determined until necessarily involved. The only statutory guide defining the manner of performing their duties by the grand jury is the oath prescribed, copied in substance, from that which has long been administered in England, followed in many states of the Union, where it has been uniformly regarded as an examining

and accusing body, rather than a judicial tribunal. Our statute makes it the duty of every member of the panel knowing or having reason to believe that a public offense has been committed, triable in the county, to inform his fellow jurors, and be sworn as a witness upon the investigation. Code, section 5260. This alone precludes the notion of an absolutely impartial trial before that body. It is accordingly held that, the fact of a member of the panel having formed or expressed an opinion of the guilt of the accused furnished no objection to the validity of the indictment. State v. Fitzgerald, 63 Iowa, 270; State v. Rickey, 10 N. J. Law, 83; State v. Hamlin, 47 Conn. 95; Musick v. People, 40 Ill. 268; Lee v. State, 69 Ga. 705; U. S. v. Williams, 1 Dill. 495, Fed. Cas. No. 16,716; Com. v. Woodward, 157 Mass. 516 (32 N. E. Rep. 939). See note to State v. Russell, 28 L. R. A. 200.

.....;

Affirmed.

(b) To Change the Place of Trial.

"The law is clear and uniform, as far back as it can be traced" that "where an impartial trial cannot be had in the proper county, it shall be tried in the next" (Rex. v. Cowle (1759), 2 Burr. 834, 859; but see Zelle v. McHenry (1879), 51 Iowa 572, 575, 2 N. W. 264, in which it is said that "A change of venue, or as it has been more recently denominated a change of the place of trial, is purely of statutory origin, it has no recognition in the common law)". In like manner, it is expressly provided by the Code that "in all criminal cases which may be pending in any of the district courts of this state, any defendant therein may petition the court for a change of place of trial to another county" (5342). We have seen elsewhere that the county in which the trial for a certain offense may be had is called the venue, so that a change to another county is called a change of venue. Such a change may be granted because of either the prejudice of the judge, or the excitement or prejudice against the defendant in the county, where either of such conditions exist to such an extent that the defendant will not be able to receive a fair and impartial trial in the original venue (5343). The "petition" for such a change must set forth the nature of the prosecution, the court where the same is pending, the ground for the change and must be verified by the defendant's affidavit (5343). In addition, if the ground is because of excitement and prejudice against him in the county, it must be verified by three disinterested persons who are residents of the county from which the change is sought (5344); and "the court may receive additional testimony by affidavits only, either on the part of the defendant or the state" (5346). When fully advised, the court must, in the exercise of a sound discretion, "decide the matter of the petition according to

the very right of it" (5348; for the order of change, proceedings after change etc., see 5349 to 5355 inclusive).

As has been shown (Chapter 1), the word "venue" is closely allied to the word "jurisdiction". It indicates the neighborhood in which the injury is declared to have been done; in which the prosecution is to be brought; and which is to furnish the panel of jurors. The fact that the place of trial is within the original venue unless there is a change of venue, in which case the place of trial is changed, seems to have obscured the fact that the "venue" is the locality or neighborhood, and to have induced the impression that it has reference to the particular tribunal in which the case is pending. Thus the change of the place of trial, on preliminary examination, from one justice of the peace to another in the same county is not a change of venue. The locality in which the offense was committed, in which it must be tried and from which must come the panel of jurors is the county - not some particular part of the county. So that a change from one magistrate to another within the county has not affected the venue in any way. But, oddly enough, the Code in speaking of change of venue uses the phrase "change of place of trial" (5343); while it refers to a change of magistrates within the venue as a "change of venue" (5217 and see 5107; but in 5585 and 5586, which have to do with the change of the place of trial within the county in prosecutions for non-indictable offenses, the phrase "change of place of trial" is used).

In preliminary examinations the defendant can obtain a change of the place of trial by filing with the magistrate, before any evidence is heard, an affidavit "that the magistrate is prejudiced against him, or is a material witness for either party, or that the defendant cannot obtain justice before him, as affiant verily believes" (5217). "On filing such affidavit a change of venue must be allowed," but only one such change shall be allowed. The change is "to the nearest magistrate in the township, if there be one; if not, to the nearest magistrate in the county" (5217). In proceedings before a magistrate under the chapter on "Security to Keep the Peace" it is provided that "a change of venue may be had as in preliminary examinations" (5107); and the provisions for the trial of nonindictable offenses are practically the same (5585 and 5586).

State v. Mewherter.

Supreme Court of Iowa, 1877. 46 Iowa 88.

During a trial for murder in the first degree the defendant filed a motion for a change of venue to some other judicial district because of the alleged prejudice of the judge. This motion having been overruled, the defendant was tried and convicted. From this judgment he appealed.

Beck, J. .....

II. A motion for a change of venue to some other judicial district, on the ground of the alleged prejudice of the judge, was overruled. It was based upon the affidavit of the prisoner, alleging that he could not receive a fair and impartial trial on account of the prejudice of the judge before whom the cause was pending. Defendant's counsel and six residents of the county, three of the latter were the members of the grand jury whose affidavits as to irregularity in presenting the indictment were filed, as stated above, supported the application by affidavits to the effect that they believed the judge was so prejudiced against the prisoner that he could not have a fair and impartial trial. No grounds were stated in these affidavits for the belief expressed, and no facts are recited, if any existed, showing or tending to show the prejudice existing in the mind of the judge as charged against him.

The provisions of the Code applicable to the questions arising upon the action of the court in denying the application for a change of venue, which is assigned as error by the prisoner, are as follows:

"Section 4368. In all criminal cases which may be pending in any of the District Courts of this State, any defendant may petition the court for a change of venue to another county.

"Section 4369. Such petition must set forth the nature of the prosecution, the court where the same is pending, and that such defendant cannot receive a fair and impartial trial owing to the prejudice of the judge, or to excitement or prejudice against him in such county, and must verify the same by his affidavit stating the same to be true as he verily believes.

"Section 4370. When the ground alleged in the petition is excitement and prejudice against him in the county, it must be verified by three disinterested persons, residents of the county from which the change is sought, in addition to the petitioner himself.

"Section 4371. The petition need not state the facts upon which the belief of the petitioner or other person verifying the same is founded, but may allege the belief of the particular ground thereof in general terms.

"Section 4372. The court may receive additional testimony, by affidavits only, either on the part of the defendant or the State, when the alleged ground in the petition is excitement and prejudice in the county against the petitioner."

"Section 4374, The court, in the exercise of a sound discretion, must decide the matter of the petition, when fully advised, according to the very right of it."

It will be observed that the requirements of the provisions applicable to the two cases, in which a change of venue is allowable, differ. When the change is sought on account of the prejudice of the people of the county, the petition must be verified by three disinterested residents of the county; additional testimony, also, may be received by the court upon the allegations of the petition. When the petition charges the judge with prejudice, it is not supported by the verification or testimony of witnesses. The court acts upon it alone. An application based upon either ground recognized by the statute is to be determined in the exercise of a sound judicial discretion.

In a case wherein the change of venue is sought upon the ground of the prejudice of the judge, it cannot be claimed that the application must be granted as a matter of course, without the court passing upon the merits and determining the existence of the cause upon which it is grounded. The court is required to exercise a judicial discretion in deciding upon the matter of the petition. This discretion is applied in determining the facts as well as the law of the case. We cannot disturb decisions of inferior courts made in the exercise of legal discretion, unless it be made to appear to us that such discretion has been abused - unlawfully exercised. In the case before us there is nothing tending to show illegal action by the court upon defendant's petition for a change of venue. No fact is brought to our attention establishing the existence of prejudice in the mind of the judge. The petition alleges prejudice without showing facts upon which such allegation is based. In this it conforms to the statute. The witnesses verifying the petition state their belief of the existence of the prejudice, but no facts upon which such belief is based. The verificatic of the petition in this way is not in conformity with the statute. As the affidavit of the witnesses states no fact - simply the belief of affiants - it cannot be regarded as the ground of judicial action. We, therefore, repeat that we have nothing before us to justify the conclusion that the decision of the court below in overruling the petition was not a proper and lawful exercise of the judicial discretion with which the judge is clothed by the statute.

We do not find it necessary to decide whether affidavits, in cases of this kind, may be admitted to show the prejudice of the judge. If admissible at all, they must show facts, not opinions and belief. As no such proof was introduced in the court below, it is not for us now to determine its admissibility in a proper case.

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Affirmed.

State v. Canada.

Supreme Court of Iowa, 1878. 48 Iowa 448.

The defendant's application for a change of venue because of the prejudice against him in the community having been overruled he was tried and convicted of murder in the second degree. He appealed.

Day, J. - On the day after the indictment was presented, the defendant presented his petition for a change of venue, duly sworn to, as follows: "Your petitioner, Benton Canada, defendant in the above entitled cause, states to the court here that at the present term of this court, to wit: May 23, 1877, he was indicted, by the grand jury of the said State and county, for the crime of murder in the first degree; that to the said indictment, so found, he here and now files his plea of not guilty; that this defendant cannot receive a fair and impartial trial, owing to the excitement and prejudice against him in this (Clarke) county. Your petitioner states his belief as to the particular grounds of excitement and prejudice to be: that the parents and relatives of the said Hunt, deceased (whom your petitioner is charged with having murdered), are old settlers of said county and State; that they are favorably known, and have and possess a very large and controlling influence over and among the people of said Clarke county, Iowa; that immediately after the alleged murder there were extended and uncalled for comments made and reflections cast by the public papers published in this county relative to said transaction, reflecting very seriously upon the character of this defendant in general, without any foundation whatever; that said strictures and reflections, so made by said newspapers, it is believed very firmly, greatly tended to arouse unduly the passions and prejudices, and very greatly excite the people of said Clarke county; that at least one of the public papers printed and published in Osceola, in said county and State, saw fit to and did publish extras of their said paper reflecting on the character of this defendant, which said charges and reflections were false in toto; that the excitement and prejudice against this defendant (he) firmly believes still to exist in the minds of the people of Clarke county, Iowa. Your petitioner firmly and religiously believes that the state of feeling against him is such, from the causes herein stated, and many others that might be stated, confidently appeals to and prays this honorable court for a change of venue in said cause, to the end that defendant may feel conscious that he is to, and will, receive a fair and impartial trial before his fellow countrymen who are free from excitement, prejudice, or in any manner biased whatever."

In support of this application the defendant filed an affidavit of D. H. Clark, as follows: "I, D. H. Clark, upon oath depose and say that I am a resident of Clarke county, Iowa, and have been for about ten years; and that I am not related to the defendant in the case of The State of Iowa v. Canada. And I further say that

the defendant, Canada, cannot obtain a fair trial in Clarke county, Iowa, owing to the excitement and the prejudice of the citizens of Clarke county, Iowa, against him. And I further say that I believe this is one of the cases in which the defendant ought to have a change of venue granted to him." Like affidavits of John M. Jamison and A. C. Rarick were filed. The State filed no counter affidavits, and made no showing in resistance of the application for change of venue. The court overruled the application.

The alleged murder was committed on the 17th day of January, 1877. The statute provides that the court, in the exercise of a sound discretion, must decide the matter of the petition, when fully advised, according to the very right of it. Code, § 4374. The statute vests in the court, not an absolute nor an arbitrary discretion, but a sound judicial discretion. If the discretion be improperly exercised, the action of the District Court may be reviewed and reversed. See State v. Nash & Redout, 7 Iowa, 347; State v. Mooney, 10 Iowa, 506; State v. Arnold, 12 Iowa, 479.

In the case of State v. Nash & Redout, supra, the following very appropriate language is employed: "It is important to maintain the usefulness of our judicial system, that no suspicion of influence from popular excitement in the administration of the law should be allowed to impair the public confidence in the fairness and impartiality of judicial proceedings. An excited state of public feeling and opinion is always the most unfavorable for the investigation of truth. Not only should the mind of the juror be wholly without bias and prejudice, it should not only be free from all undue feeling and excitement in itself, but it should be, as far as possible, removed from the influence of prejudice and feeling and excitement in others. A circumstance of small importance in itself may often, in the midst of a community stirred by passion and excitement, serve to turn the scales of justice." Where so much is left to the judicial discretion of the court, precedents can be of but little aid. Each case must depend upon its own peculiar fac and circumstances. In this case, in view of the magnitude of the offense charged, the shortness of the time between its alleged commission and the trial, the particular circumstances of prejudice set forth in the petition for change of venue, and the fact that no counter showing was made by the State, we think that the court should have granted a change of venue, and that, in the refusal of it, the discretion vested in the court was not properly exercised. This disposition of the case renders a consideration of the other questions presented unnecessary.

Reversed.

Ottumwa v. Schaub.

Supreme Court of Iowa, 1879. 52 Iowa 515, 3 N. W. 529.

In affirming a decision of the district court, Day, J. speaking for the court said:

"It was held by this court, in Finch v. Marvin, 46 Iowa, 384, that upon proper application a change of venue should be granted from the court of a mayor to that of a justice of the peace. But upon the filing of a motion for a change of venue the mayor does not lose his jurisdiction over the cause. If the motion is overruled, the ruling is simply erroneous. The judgment subsequently rendered is not void for want of jurisdiction. It follows that upon the appeal of this cause to the District Court that court acquired jurisdiction, and that the motion to dismiss the appeal was properly overruled." ..... Affirmed.

(c) For Other Purposes.

"The defendant shall, if he demands it upon entering his plea, be entitled to three days in which to prepare for trial". (5370). If for any reason more time than this is needed, he can file a motion for a continuance (5370, and see 3663 and 3664). Furthermore, it is to be remembered that a motion must of necessity be an instrument that can be adapted to any peculiar need that arises. In addition to the special provisions of the Code that have been mentioned, the defendant may file a motion for any special rule or order to which he may be entitled. To illustrate: it is expressly provided by the Code that "if a defendant indicted for a public offense, whose trial has not been postponed upon his application, be not brought to trial at the next regular term of court in which the indictment is triable after the same is found, the court must order it to be dismissed, unless good cause to the contrary be shown" (5536). If necessary the defendant may file a motion to dismiss the prosecution because not brought to trial in proper time. (See State v. Sloan (1906), 131 Iowa 676).

Section 4.

Demurrers.

If all the allegations in the indictment, assuming them to be true, are insufficient in point of law to authorize the conviction of the defendant, he may file a demurrer. The same is true if the indictment states facts which are legally sufficient to charge an offense, but also states other matters which, if true, would

constitute a legal defense or bar to the prosecution. This is ture both at common law and under the Code (5328). At common law the demurrer went even further, bringing the whole record before the court, so that if there were any defect apparent from the face of either the indictment or the record, it could be reached in this way. "A demurrer to the indictment may be filed with the clerk or made in open court, and shall be entered of record substantially in the following form: 'The defendant demurs to the indictment'" (5330). The point of a demurrer is that, admitting that all of the allegations of the indictment are true, the defendant should not, as a matter of law, be required to answer thereto. This invites inquiry as to what is to happen by reason of this admission if the court decides that the indictment is legally sufficient and proper. There is no reason in the nature of things why this admission should be of any more force than "for the sake of argument" of the demurrer. But admissions in demurrers have been given greater effect than this. Thus it was said by an early writer that "if he demurre in Law, and it be adjudged against him, he shall have judgment to be hanged" (2 Inst. 178). The severity of this rule was modified somewhat in the course of time by the fact that the courts sometimes allowed the defendant to withdraw his demurrer and plead over. The permission to plead over came to be granted commonly in cases of felony, but seldom in cases of misdemeanor. Under the Code there is not distinction between felonies and misdemeanors in so far as the matter of pleading over is concerned, which, it may be added, is no longer a privilege to be granted or withheld in the discretion of the court, - it is a right belonging to the defendant. ("If the demurrer is overruled, the defendant has a right to plead to the indictment," (5332).

But the ancient rule that a judgment against the defendant upon a demurrer, resulted in a judgment of conviction, did not wholly fail to leave its impression upon the law today. "If the defendant fails or refuses to plead to the indictment by demurrer or plea, a plea of not guilty must be entered by the court" (5336). But if he files a demurrer which is overruled, and thereafter fails or refuses to plead "final judgment may be rendered against him on the demurrer" (5332).

State v. Dingee.

Supreme Court of Iowa, 1864. 17 Iowa 232.

The state appealed from a judgment sustaining defendant's demurrer to the indictment.

Cole, J. - The indictment was found at the November Term, 1863, and is for adultery alleged to have been committed by the defendant, a married man, with one Rebecca Austin, and is in the

usual form. After concluding the averment of facts showing the offense, the indictment contains the further averments, "that, on the day and year aforesaid, at the county aforesaid, Jane Dingee was the lawful wife of said Jacob Dingee and that, at said county, on the 9th day of September, A. D. 1863, the said Jane Dingee, being still the wife of said Jacob Dingee as aforesaid, did commence this prosecution for said crime of adultery against said Jacob Dingee, by filing in the office of A. Monson, a justice of the peace in said county, an information, under oath, charging said Jacob Dingee with said crime, and taking such other steps that, in the further progress of said prosecution, the said Jacob Dingee, on the 11th day of September, was, by said justice of the peace, held to answer said charge at the next term of the District Court of said county, as by law provided." The name of Jane Dingee, the wife, was not indorsed on the back of the indictment. The defendant demurred, because, "First, the indictment shows that this action is not commenced on the complaint of the wife. Second, the indictment shows that the wife of defendant was not before the grand jury by whom the indictment was found. Third, the person with whom the pretended adultery is alleged to have been committed is not joined in the indictment." This demurrer was sustained; and the correctness of that decision is the only question for our determination. The first cause of demurrer is not true in fact, as appears by the indictment itself, which shows that the prosecution was commenced on the complaint of the wife. The second cause assigned is entirely immaterial; for, if the prosecution was commenced on the complaint of the wife, that is sufficient, without her appearance before the grand jury.

[The third cause also was held to be groundless.]

..... The judgment of the District Court is therefore reversed, and the cause remanded, with instructions to overrule the demurrer, and give leave to defendant to plead over.

Reversed.

State v. Evans.

Supreme Court of Iowa, 1900. 111 Iowa 80, 82 N. W. 429.

From an order that the indictment be set aside on the ground that it was defective and the cause be resubmitted to a grand jury, the state appealed.

Given, J. - I. This appeal is not, as defendant's counsel seem to regard it, from the order resubmitting the case only, but it is from the judgment as rendered, and it is of that part which set aside the indictment and discharged the jury that the state complains. Appeals in criminal cases, whether by the state or

the accused, "can only be taken from the final judgment." Code, section 5448. State v. Swearengen, 43 Iowa, 336; State v. Davis, 47 Iowa, 634. Is this a final judgment? Section 5272 of the Code provides that "the charge" be again submitted, and the defendant continued in custody, or on bail, whom the grand jury have failed to indict on the first submission. Section 5324, in relation to setting aside indictments, provides:"If the motion be granted, the court must order the defendant, if in custody, to be discharged, or, if admitted to bail, that his bail be exonerated, or, if he has deposited money instead of bail, that the money deposited be refunded to him, unless the court direct that the case be re-submitted to the same or another grand jury." Section 5331 of the Code, in relation to demurrers to indictments, contains the following: "If sustained because the indictment contains matter, which is a legal defense or bar to the indictment, the judgment shall be final and the defendant must be discharged; if sustained on any other ground, the defendant must be discharged and his bail exonerated, if bail has been given, unless the court is of opinion, on good cause shown, that the objection can be remedied or avoided in another indictment, in which case the court may order the cause to be re-submitted to the same or another grand jury, and the defendant may be held in custody, if not at large on bail, in which case the undertaking given shall remain in force." If there had been no order resubmitting the case, the judgment would have ordered the discharge of the accused, and exonerated his bail, and this would have been a final judgment; but, there being such an order, the defendant is not discharged, nor his bail exonerated. By the finding of an indictment this case was brought into existence against the defendant. It is this case that the statute authorizes, under the conditions named, to be resubmitted, and it is this "cause" that was ordered resubmitted. A reindictment is a substitution of the second charge for the first, and a grand jury alone can do this. Therefore, we have these provisions for resubmitting "the cause." If the statute of limitations was asserted against the second indictment, the first having been returned within the time required, the state would hardly concede that the judgment setting aside the first indictment, and ordering the case resubmitted, was a final judgment. Concede that the court erred in the judgment it rendered, the state was not materially prejudiced. It might go forward in the prosecution of this case to a final judgment. It surely has little to gain by this appeal, but, be that as it may, we are of the opinion that, a resubmission having been ordered, there has been no final judgment in this case from which either party can appeal. The motion to dismiss the appeal is sustained. - Dismissed.

Pleas.

(a) In General.

We have seen that without a proper arraignment of the defendant, or a waiver thereof by him, there can be no valid trial. The same is true of the plea except that no waiver can be permitted. The reason for this is that the plea is necessary in order to create an issue to be tried. As there would be no issue if the plea were waived there would be nothing to try. In ancient times, if a person indicted for a felony "stood mute", an inquest of office was taken to determine whether it was ex malitia or ex visitatione Dei, unless he had spoken in court on the same day. If it was determined that he maliciously stood mute, judgment of peine fort & dure was given against him. This was "that he be sent to the prison from whence he came, and put into a dark, lower room, and there to be laid naked upon the bare ground upon his back without any clothes or rushes under him or to cover him except his privy members, his legs and arms drawn and extended with cords to the four corners of the room, and upon his body laid as great a weight of iron, as he can bear, and more. And the first day he shall have three morsels of barley bread without drink, the second day he shall have three draughts of water, of standing water next the door of the prison, without bread, and this to be his diet till he die" (2 Hale, Pleas of the Crown 319). "This judgment is given for his contempt in refusing his legal trial, and therefore he thereby forfeits his goods, but it is no attainder, nor gives an escheat or corruption of blood" (Ibid. 319). In time the defendant who refused to plead was dealt with more humanely by the rule that an obstinate refusal to plead amounted to a plea of guilty (Com. v. Moore (1812), 9 Mass. 402); while under the Code "if the defendant fails or refuses to plead to the indictment by demurrer or plea, a plea of not guilty must be entered by the court" (5336). In effect the failure or refusal to plead is equivalent to the plea of not guilty and the entry thereof by the court is a purely formal matter. Thus if the defendant is given an opportunity to plead and is tried in all respects as if a plea of not guilty had been entered, a judgment of conviction upon a verdict of guilty will not be reversed merely because the court inadvertently failed to enter a plea of not guilty. (State v. Hayes (1885), 67 Iowa 27, 24 N. W. 575).

Whether the defendant was entitled to more than one plea or not at the common law, as to which the writers do not agree, (See 1 Chitty, Criminal Law 434 and 2 Hawkins, Pleas of the Crown c 23 § 128), the plea of former conviction or acquittal "may be pleaded alone or with the plea of not guilty" under the Code (5336).

(b) Pleas Not Used Under the Code.

(1) Plea to the Jurisdiction.

By this plea the defendant questions the authority of the court to try him for the offense. If the lack of jurisdiction is shown on the face of the indictment it is demurrable; and in any event evidence showing that an offense was committed outside of the jurisdiction of the court could not support a conviction and may be excluded at the trial. So this plea served no useful purpose, was seldom used, and is not permissible under the Code.

(2) Plea of Sanctuary.

"Formerly there was another plea, now abrogated, that of sanctuary; which is, however, necessary to be lightly touched upon, as it may give some light to many parts of our antient law: it being introduced and continued during the superstitious veneration that was paid to consecrated ground in the times of popery. First, then, it is to be observed that if a person accused of any crime (except treason, wherein the crown, and sacrilege, wherein the church, was too nearly concerned) had fled to any church or church yard, and within forty days after went in sackcloth and confessed himself guilty before the coroner, and declared all the particular circumstances of the offence; and thereupon took the oath in that case provided, viz., that he abjured the realm, and would depart from thence forthwith at the port that should be assigned him, and would never return without leave from the king; he by this means saved his life if he observed the conditions of the oath by going with a cross in his hand, and with all convenient speed to the port assigned and embarking. For if, during his forty days' privilege of sanctuary, or in his road to the seaside, he was apprehended and arraigned in any court, for this felony, he might plead the privilege of sanctuary, and had a right to be remanded, if taken out, against his will. But by this abjuration his blood was attainted, and he forfeited all his goods and chattels. The immunity of these privileged places was very much abridged by the statutes 27 Hen. VIII, c. 19, and 32 Hen. VIII, c. 12. And now, by the statute, 21 Jac. I, c. 28, all privilege of sanctuary, and abjuration consequent thereupon, is utterly taken away and abolished." (Black. Com. 332).

(3) Benefit of Clergy.

"Formerly also the benefit of clergy used to be pleaded before trial or conviction, and was called a declinatory plea; which was the name also given to that of sanctuary. But, as the prisoner, upon a trial has a chance to be acquitted and totally discharged, and if convicted of a clergyable felony is entitled equally to his clergy after as before conviction, this course is extremely disadvantageous; and therefore the benefit of clergy is now rarely pleaded, but, if found requisite, is prayed by the convict before judgment is passed upon him". (IV Blackstone Com. 333). "Antiently princes and states converted to christianity in favor of the clergy, and for their encouragement in their offices and imployments, and that they might not be so much intangled in suits, did grant to the clergy very bountiful privileges and exemptions, principally of two kinds. 1. Exemption of places consecrated to religious duties from arrests of crimes, which was the original of sanctuaries. 2. Exemption of their purposes from criminal proceedings in some cases capital before secular judges, which was the true original of the privilegium clericale "(2 Hale, Pleas of the Crown 323).

(4) Plea in Abatement.

This plea was available to take advantage of any defect which rendered the indictment insufficient, whether such defect appeared on the face of the indictment or of the record or was wholly outside of both. From this it is obvious that to a large extent it covered ground also covered by the motion to quash (or set aside) the indictment and the demurrer, either of which were used commonly in preference to the plea in abatement where such a choice existed. The chief use of the plea was in cases in which the defendant was indicted by a wrong name or described by an improper addition. With additions we have nothing to do, and a different provision is made by the Code for a misnomer, in that part of the arraignment consists in forming the defendant that "if the name by which he is indicted is not his true name, he must then declare what his true name is, or be proceeded against by the name in the indictment" (5315). "If he alleges that another name is his true name, the court must direct an entry thereof in the minutes of the arraignment, and the subsequent proceedings on the indictment may be had against him by that name, referring also to the name by which he is indicted" (5317). Since the chief purpose for which this plea would be used is taken care of in a more simple manner, the Code does not authorize the use of this plea (5333; but see Supp. '13 () 5289, in which it says that "all objections to the indictment relating to matters of substance and form which might be raised by a plea in abatement" etc.).

(5) Plea of Nolo Contendere.

If the defendant was indicted for an offense which did not involve capital punishment, he might offer a plea which did not expressly confess his guilt, but impliedly did so by throwing himself on the king's mercy. This plea differed from the plea of guilty in two respects. It could not be entered unless it was accepted by the court. If it was accepted by the court the filing of such a plea could not be used in a civil action for the same injury as a confession of guilt. There appears to be no need for such a plea and it is not permitted by the Code (5333).

(6) Plea of Agreement to Turn State's Evidence.

In Texas it is held that a plea that defendant has contracted with authorized parties to turn state's evidence in certain prosecutions then pending and is ready to carry out this agreement, may be accepted with the consent of the court, for the reason that such contract, when carried out in good faith, is the ground of obtaining a pardon after conviction, on the recommendation of the judge (Cameron v. State (Tex. Cr. App., 1894) 25 S. W . 288). This plea, if recognized elsewhere at all, is quite rare.

(7) Plea of Pardon.

It was a rule of the common law that an offender could not be tried for an offense for which he had been pardoned. But unless the pardon was by a public statute, of which the court would take judicial notice, a special plea was required - the plea of pardon. If the defendant did not enter this plea he could be tried and convicted, though it seems his pardon would still protect him from punishment.

As the governor's power to grant pardons in this state is expressly limited to "after conviction" (Const. of Iowa Article 4, Section 16; for statutory provisions on paroles and pardons see Comp. Code of '19 ()2242 to 2262 inclusive) when the plea of former judgment of conviction would be available, there is no reason for such a plea under the Code, and none is allowed (5333)

(c) Pleas Under the Code.

"There are but three pleas to the indictment - (1) guilty, (2) not guilty, or (3) of a former judgment of conviction or acquittal of the offense charged" (5333).

(1) Plea of Guilty.

The plea of guilty does not give rise to any issue. It is a formal confession of guilt before the court, and is practically equivalent to a conviction. At common law this court, in its discretion, might refuse or permit the withdrawal of a plea of guilty and the substitution of another plea therefor, at any time before sentence was passed. Much like this seems the provision of the Code that "at any time before judgment, the court may permit the plea of guilty to be withdrawn and other plea or pleas substituted" (5337). But it has been held that in spite of the word "may" in this section, the provision is mandatory upon the court and is not a matter of discretion - the defendant has an absolute right to withdraw the plea of guilty before judgment is passed thereon (State v. Oehishlager (1874) 38 Iowa 297).

"The plea of guilty can only be made by the defendant himself, in substantially the following form: 'The defendant pleads that he is guilty of the offense charged in the indictment', and shall be entered of record" (5334).

(2) Plea of Not Guilty.

Where a claim is made against the defendant in a civil action on certain alleged facts, the existence of which the defendant intends to deny on the trial, his pleading is framed in such a way as to deny generally the facts charged against him. If, on the contrary, the defendant intends to admit on the trial that the facts alleged against him are true, but to defend by proving other facts which constitute an excuse or justification under the particular circumstances, the rule of civil procedure requires him to show this by the nature of his pleading, which is called one of confession and avoidance. He is not entitled to introduce such proof under a plea which purports merely to deny the facts charged. No such distinction is known to criminal procedure. If a defendant, charged with having feloniously taken and carried away the goods of another etc., intends to defend on the ground that he did

not take the goods, his plea is "not guilty". But if his defense is that although he did take the goods, they were his own property; or that while he took the goods of that other, he did so with the consent of such person; or that while he took the goods of the other without his consent he did so under the bona fide belief that he had a right to take them; or that he did so as an officer of the law with proper authority so to act;- in all such instances his plea is also "not guilty". In truth the plea of "not guilty" does not purport to say whether the facts charged are untrue or whether there are other facts which, in point of criminal law, nullify the effect of those alleged. It purports no more than its face value - that the defendant is "not guilty" of the offense charged, and thus puts in issue every fact upon which his guilt or innocence may depend. In an early case (Peters v. State (1851), 3 G. Greene 74), a defendant, indicted for selling liquor without a license pleaded that he acknowledged that he sold the liquor, but averred that he did so by virtue of license issued to him for that purpose. Having been tried on that issue and found guilty, filed a motion in arrest of judgment which was sustained on the ground that he should not have been tried on such a plea. The ple should have been not guilty. (The motion was overruled by the lower court, but this was held to be error by the supreme court, and the judgment was reversed).

This plea "may be in writing, filed with the clerk, or made in open court, in substantially the following form: 'The defendant pleads that he is not guilty of the offense charged in the indictment'" (5335).

(3) Plea of a Former Judgment of Conviction or Acquittal of the Offense Charged.

Elsewhere (Chapter III) we have seen that a man has a right not to be tried for an offense of which he has been acquitted or convicted, and have seen to what extent these rules of "former jeopardy" extend. We have to consider here only the problem of pleading that arise in this connection. The former acquittal or conviction of the defendant is strong evidence that he was innocent or guilty respectively; but it is not a fact which constitutes his guilt or innocence, or upon which his guilt or innocence may depend. Hence it cannot be interposed under a plea of not guilty, but requires this special plea. On the other hand this special plea can never take the place of the plea of "not guilty". The plea of former judgment of acquittal of the offense charged is not a plea that he is not guilty of the offense. The Code permits the defendant to file a plea of not guilty with this plea (5335) and the careful pleader will not fail to do so, although it has been

intimated that after a verdict against him on the issue of former jeopardy he would be permitted to plead over if he so desired (State v. Green and Mann (1864), 16 Iowa 239). This plea "may be in writing, filed with the clerk, or made in open court, in substantially the following form: .....'The defendant pleads that he has formerly been convicted (or acquitted, as the case may be) of the offense charged in the indictment by the judgment of the ..... court of ..... (naming it), rendered on the ..... day of .....,A. D. .....' (naming the time)" (5335).

Section 6.

Waiver.

The common law developed two methods by which certain defects in the proceedings of a criminal prosecution might be cured. One was by waiver and the other was known as "aider by verdict." The result is the same in both to the extent that the defendant who does not make certain objections at the proper time loses the right to insist upon them. But the theory is different. The notion underlying the one is that, by going ahead as though the defect did not exist, the defendant has voluntarily abandoned his right to object; while the theory of the other is that after the verdict of guilty is added to the record, the defect has disappeared.

If a defendant is indicted by the wrong name he has a right to object to the misnomer (formerly by plea in abatement; under the Code by giving his correct name at the arraignment - 5315 to 5316 inclusive), which right will be gone if he enters a plea of not guilty without objection to this error. This is a waiver. If we assume for the sake of argument that an indictment charging the defendant with breaking and entering the "place of business" of X is insufficient because it does not clearly aver that a house or building of any kind was broken and entered; such defect is cured by a verdict that the defendant is guilty of a statutory breaking and entering, because this verdict could not have been reached if this "place of business" had been found to be an unsheltered plot of ground (see Keeman v. State (1912) 10 Ga. App. 792, 74 S. E. 297). This is aider by verdict. Further examples may be helpful. A defendant by pleading to the merits without objecting to such matters, waives the right to insist upon the lack of genuineness of the indictment as a record, the irregularity in the summoning, impaneling or qualifying of the grand jurors, any mere irregularities in the proceedings of the grand jury, or that he was indicted by the wrong name; while an error in the name of the person injured or an insufficiency in any necessary averment is cured by a verdict of guilty.

Considerable confusion is to be found in the language of the cases due to the fact that the failure of a defendant to raise, before verdict, an objection that was cured thereby, is frequently referred to as a "waiver"; and also to the fact that it is frequently stated that a verdict cures defects, which were in fact waived before the verdict was reached. Curiously enough, neither of these statements is really erroneous. For a defect which has been "waived" still exists even though it can be insisted upon no longer; and since it still exists it can be aided by the verdict. As to the other, there is considerable justification for the use of the word "waiver" in a case where the defendant has lost his right to object because he waited until after the verdict was reached. To show that waiver is not limited to the time of filing the plea of not guilty, no more is necessary than to mention that the right to challenge members of the trial jury is waived if not exercised at the appointed time (Comp. Code ⁋⁋ 4919 - 4929 inclusive).

The Code provides that "all objections to the indictment relating to matters of substance or form which might be raised by a plea in abatement shall be deemed waived if not raised by the defendant before the jury is sworn on the trial of the case." (Supp. '13, ⁋ 5289).

State v. Gibson.

Supreme Court of Iowa, 1919. - Iowa - , 174 N. W. 34.

The defendant appealed from a judgment of conviction on an indictment charging that he "did attempt by speech, action, and manner of speaking to incite, abet, promote and encourage hostility and opposition to the government of the state of Iowa and of the United States, contrary to the statutes in such cases made and provided, and against the peace and dignity of the state of Iowa."

Salinger, J. - I. One complaint lodged is that, contrary to section 5280 of the Code, the indictment does not enable a person of common understanding to know what was intended. It is conceded that this objection is made here for the first time. It comes too late thus made. And we cannot review it.

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Affirmed.

State v. Daniels.

Supreme Court of Iowa, 1894. 90 Iowa 491, 58 N. W. 891.

The defendant appealed from a judgment of conviction on an indictment charging him with "designedly and by false pretenses securing the signature of another to a written instrument."

Granger, C. J. - The section of the Code under which the indictment is found is 4073, and it provides that "if any person designedly or by false pretenses, ...and with intent to defraud, ... obtain the signature of any person to a written instrument, ... he shall be punished," etc. The indictment in this case charges the obtaining of the signature of one D. A. Bendon to a promissory note, but it does not charge that the signature was obtained with intent to defraud, and it is urged that the indictment is fatally defective. It is clearly so, and that fact is not questioned in argument, but it is said that no objection of any kind was made to the indictment below, nor was there a motion in arrest of judgment, and that the objection can not be first raised in this court. That rule obtains in civil, but not in criminal, cases. The law requires the supreme court. on appeal in criminal cases, to examine the record, and, without regard to technical errors or defects which do not affect the substantial rights of the parties, render such judgments on the record as the law demands. Code, section 4538. In State v. Potter, 28 Iowa, 554, the above language is quoted, and it is then said: "We would not, in a criminal case, affirm a judgment when it appears that the defendant is charged with no offense against the laws, though he should in no stage of the proceedings, either in this court or the court below, object on that ground." By the failure of the indictment to charge that the signature was obtained with intent to defraud, no offense is stated, and there can be no legal conviction under it. The judgment is Reversed.

State v. Alexander.

Supreme Court of Iowa, 1918. 169 N. W. 657.

From a judgment of conviction the defendant appealed.

Per Curiam. ..... There are two offenses involved in this statute: (1) The keeping of a place resorted to for the purpose of gambling; and (2) the permitting or suffering any person to play at cards or any game for money in any place under the control or care of the person sought to be charged. One is not guilty of this last offense simply because cards or games of chance are played for money in a place or building under his control or care,

unless he suffers or permits the games to be played. Therefore, to make him culpable, it must appeal that he suffered or permitted games to be played. If this element is essential to constitute the crime in proof, it is essential to constitute the crime in allegation. It will be noted that nowhere in the indictment does the state charge that the defendant suffered or permitted it to be so used. The indictment simply says that he kept the building, had the care of it, used it, and in that building playing cards for money was carried on and practiced on the 9th day of December, 1916. It does not say that it was with his permission, with his knowledge, or that he suffered or permitted it. This being an essential element of the indictment, and material to constitute crime, the indictment was subject to demurrer. The evidence shows he was present and took part in the game played for money in the building. This shows that he suffered and permitted the game to be played. The indictment was not attacked on this ground until after the evidence for the state was all in, and then only in a motion for a directed verdict. This was too late, under our holding in State v. Gardner, 174 Iowa, 748, 156 N. W. 747, L. R. A. 1916 D, 767, Ann. Cas. 1917 D, 239.

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Affirmed.

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